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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 188.

MINNESOTA STATE LIBRARY

EUGENE C. KREIGH, PETITIONER,

vs.

WESTINGHOUSE, CHURCH, KERR AND COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 7, 1907.
CERTIORARI AND RETURN FILED NOVEMBER 16, 1907.

(20,878.)

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In the United States Circuit Court of Appeals for the Eighth District.

Eugene C. Kreigh, Plaintiff in Error.
#2423. vs.
Westinghouse Church Kerr and Company, Defendant.

Stipulation.

It is hereby stipulated and agreed by the parties to this cause, that the testimony of Dr. L. C. Allen and Dr. C. A. Jackson relates only to the extent of plaintiff's injuries and does not affect the merits of the case, and that the testimony of said witnesses may be omitted from the printed record in said cause.

ELLISON & TURPIN,
Attorneys for Plaintiff.

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendant.

No. 2423, Eugene C. Kreigh, Plaintiff, vs. Westinghouse Church, Kerr & Company, Defendant. Stipulation as to printing. Filed June 9, 1906, John D. Jordan, Clerk.

1 The United States of America,

To Westinghouse, Church, Kerr & Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein Eugene C. Kreigh is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 10'' day of March in the year of our Lord one thousand nine hundred and six.

JOHN C. POLLOCK,
United States District Judge, for the District of Kansas.

Service of the above citation accepted this 13th day of March 1905.

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendant.

2 No. 8323, United States Circuit Court, First Division of the Judicial District of Kansas. Eugene C. Kreigh vs. Westinghouse, Church, Kerr & Company, Citation. Filed March 10th, 1906. Geo. F. Sharitt, Clerk.

United States of America, ss.
3 The President of the United States.

To the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas,—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the November Term, 1905, thereof, between Eugene C. Kreigh, plaintiff, and Westinghouse Church, Kerr & Company, defendant a manifest error hath happened, to the great damage of the said Eugene C. Kreigh as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 9" day of May 1906, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of March in the year of our Lord one thousand nine hundred and six.

The Seal of the Circuit Court of the United States District of Kansas

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the judicial District of Kansas.

4 Allowed by John C. Pollock, Judge.

Return to Writ.

United States of America,
First Division of the Judicial District of Kansas,—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court of the United States District of Kansas.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 15'' day of March A. D. 1906.

GEO. F. SHARITT.
Clerk of said Court.

No. 8323. United States Circuit Court, First Division of the Judicial District of Kansas. Eugene C. Kreigh vs. Westinghouse Church Kerr & Co. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 10'' day of March 1906. Geo. F. Sharitt, Clerk.

In the District Court in and for Wyandotte County, State of Kansas

5 Eugene C. Kreigh, Plaintiff
vs.
Westinghouse Church Kerr and Company, (a corporation) and The Proctor and Gamble Company, (a corporation) Defendants.

Petition for Damages.

Plaintiff for his cause of action states: That defendants are, and have been at all times hereinafter mentioned, corporation duly organized, created and existing;

That defendant The Proctor and Gamble Company is the owner of and has control of a certain soap plant in the City of Kansas City, Kansas, with buildings and appurtenances thereto belonging; and that said plant has been for the last year in the course of erection and construction for said defendant The Proctor and Gamble Company by said defendant Westinghouse Church Kerr and Company under a contractual relation between said defendants, and that said The Proctor and Gamble Company has had a supervising interest in all of said

work; that at all times herein stated plaintiff has been in the employ of defendant Westinghouse Church Kerr and Company as foreman of the brick work on said plant;

That on the 25th day of October, 1904 plaintiff was standing on the upper part of one of said buildings about 42 feet above the ground near the north wall of one of said buildings, engaged as foreman as aforesaid in the service of defendant Westinghouse Church Kerr and Company, in looking after such brick work, and was at such time and place in the exercise of reasonable care and caution;

That at such time there were in said building certain other workman of defendants engaged in concreting the roof of said building, and managing, operating and controlling a derrick used in connection with such concreting work; that
6 plaintiff has no control over or no connection with said concrete workmen or said derrick.

While the plaintiff was engaged as aforesaid on the 25th day of October, 1904, defendant's servants, agents and employees in charge of, operating and controlling said derrick, ropes, pulley, tubs and buckets in connection therewith, negligently, carelessly and with reckless disregard for plaintiff's safety in the premises, swung around said derrick, or a part thereof, so that a tub attached to said derrick struck plaintiff from behind, plaintiff not knowing of the approach of the same, but said agents, servants and employees controlling said derrick saw plaintiff and his perilous position before he was struck with said tub, or by the exercise of reasonable care and caution could have seen plaintiff before he was struck, but they negligently and carelessly swung around a part of said derrick as aforesaid so that plaintiff was struck with said tub as aforesaid, and was knocked headlong from said building, falling outside of the north wall of said building and going down a distance of about 42 feet, striking against parts of said building on his downward course, and finally striking the ground near a railroad track on the north side of said building, causing plaintiff to receive severe and permanent injuries in this to-wit:

Plaintiff's lower jaw was dislocated, fractured, broken and permanently injured, nearly all of his teeth were either knocked out at the time or were so damaged that they have since had to be removed on account of said injuries; that his lips and face were cut and are permanently disfigured; both elbows, his ribs and left foreleg were bruised and are permanently injured; plaintiff was and has for a long time been confined to his bed, and has suffered pains in his sides, difficulty in breathing, pains in his legs, inability to chew food or move his jaw, and has been troubled with difficulty in swallowing on account of

said injuries. Plaintiff has suffered by reason of all of which both great bodily and physical pain and mental anguish, and has lost and will in the future loose a great deal of time from his business in looking after his affairs and has expended and will in the future expend large sums of money in medical attention and medicines, and nursing in connection with such wounds and injuries, and has been permanently injured in all
to plaintiff's damage in the sum of fifteen thousand
7 ($15.000.00) dollars.

Wherefore, plaintiff prays for judgment against defendants for the sum of Fifteen thousand ($15.000.00) dollars, and for costs of this action.

ELLISON & TURPIN,
Attorneys for Plaintiff.

Endorsed: No. 18514, Filed Dec. 24, 1904 Wm. Needles, Clerk by D. C. McCoombs, Deputy.

Endorsed on back: 18514 Eugene C. Kreigh vs. Westinghouse Church Kerr & Co. et al. Copy of petition.

Precipe.

8 District Court of Wyandotte County, Kansas.

Eugene C. Kreigh
vs.
Westinghouse, Church, Kerr & Co., et. al.

To the Clerk of said Court: Issue summons against both of defendants in the above entitled cause, returnable according to law, directed to the Sheriff of Wyandotte county.

ELLISON & TURPIN,
Attorneys for Plaintiff.

Endorsed: No. 18514 Filed Dec. 24, 1904 Wm. Needles, Clerk, By D. C. McCombs, deputy.

9 United States of America.

State of Kansas,
Twenty-Ninth Judicial District,
Wyandotte County—ss.

The State of Kansas, to the Sheriff of Wyandotte County, in said State, Greeting:—

You are hereby commanded to notify Westinghouse, Church, Kerr and Company, a corporation, and The Proctor and Gamble Company, a corporation, defendants, that they have been sued by Eugene C. Kreigh plaintiff, in the District Court of the State of Kansas, sitting within and for the County of

Wyandotte, and that unless they answer by the 23d day of January, 1905, the petition of said plaintiff against them filed in the clerk's office of the court aforesaid, the same will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 3 day of January, 1905.

Witness my hand and the seal of said court, affixed at my office in the city of Kansas City, this 24 day of December, 1904.

[Seal] WM. NEEDLES, Clerk.
By D. C. McCombs, Deputy.

Endorsed; No. 18514: Summons. Issued Dec. 24, 1904, returnable Jany. 3, 1905. Filed Dec. 30, 1904. Wm. Needles, Clerk, by E. S. Cable, Deputy.

Suit brought for the recovery of money. Amount claimed $15.000.

WM. NEEDLES, Clerk.
By D. C. McCombs, Deputy.

10 Sheriff's Return (attached to Summons)

State of Kansas,
County of Wyandotte--ss.

Received the within writ this 24 day of Dec. A. D. 1904, and served the same in said county on the within named defendant, Westinghouse, Church, Kerr & Company, a corporation, by delivering to W. J. Clem, personally, he being the agent for said company, actually engaged in its business for and on behalf of said company, in Wyandotte County, Kansas, a true and certified copy of said writ on the 29 day of December, 1904.

I certify that I could not find the mayor, chairman of the board of trustees or directors or other chief officer, cashier, secretary, treasurer, clerk of said company in Wyandotte County, Kansas, in which I have jurisdiction to serve summons and process of law, and that said officers of said company were not in my county.

I further certify that the said defendant is a foreign corporation doing business in this state, that it has no office or place of business within this state, and that service of the within writ cannot be had in this state otherwise than in the manner herein set forth.

I further certify that the Clerk of the District Court of Wyandotte County, Kansas, has no certificate of appointment and designation filed in his office by said company designating

any person residing in the County of Wyandotte and State of Kansas on whom all process and notice issued by any court of record may be served, and that said company has never designated any person residing in Wyandotte County Kansas, on whom to serve summons.

State of Kansas,
County of Wyandotte—ss.

Received the within writ this 24 day of Dec. A. D. 1904 and served the same in said county on the within named defendant the Proctor and Gamble Company, a corporation, by delivering to F. F. Skillman, personally he being the Superintendent for and on behalf of said company in Wyandotte County, Kansas, a true and certified copy of said writ, on the 29'' day of Dec. 1904.

I certify that I could not find the president, mayor,
11 chairman of the board of directors or trustees, or other chief officer, cashier, secretary, treasurer, clerk or managing agent of said company in Wyandotte County, Kansas, in which I have jurisdiction to serve summons and process of law, and that said officers of said company were not in my county.

I further certify that the clerk of the District Court of Wyandotte county, Kansas, has no certificate of appointment and designation filed in his office by said company designating any person residing in the county of Wyandotte and State of Kansas, on whom all process and notice issued by any court of record may be served, and that said company has never designated any person residing in Wyandotte county, Kansas, on whom to serve summons:

Copy	.50
Service	.75
Mileage	1.00
Total	2.25

H. A. MENDENHALL,
Sheriff of Wyandotte County, Kansas.

12 In the District Court of Wyandotte County, Kansas.

Eugene C. Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr & Company, a corporation, and the Proctor and Gamble Company, a corporation,
Defendants.

Petition for Removal of Cause to the United States Circuit Court.

To the Honorable District Court of Wyandotte County, Kansas.

Your petitioners, Westinghouse, Church, Kerr & Company, and the Proctor and Gamble Company, respectively, aver that they and each of them are corporations duly organized and created under the laws of the State of New Jersey and that the above named plaintiff, Eugene C. Kreigh, is a citizen and resident of the State of Missouri; that petitioners are defendants in the above entitled suit; that the matter in dispute therein exceeds, exclusive of interest and costs the sum of two thousand dollars ($2,000.00) and said suit is of a civil nature, wherein said plaintiff seeks to recover against the defendants, the sum of fifteen thousand dollars ($15,000.00) based upon the alleged negligence of defendants, whereby plaintiff is alleged to have [-] injured while working upon the construction of a building in Wyandotte county, Kansas, resulting, so it is averred, in injury and damage to the plaintiff.

Your petitioners further state that in said suit, there is a controversy which is between citizens of different states and which can be fully determined between them, to-wit: a controversy between your petitioners which aver, that they and each of them were at the commencement of this suit, and still, are citizens and residents of the state of New Jersey, and said plaintiff, Eugene C. Kreigh who your petitioners aver, was at the commencement of said suit, and still is, a citizen and resident of the State of Missouri; that both Eugene C.
13 Kreigh, the plaintiff, and your petitioners are actually interested in said controversy and that your petitioners herein offer a bond, with good and sufficient security for its entry into the Circuit Court of the United States for the District of Kansas, First Division, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto; and your petitioners pray this court to proceed no further herein except to make an order of removal and to accept the said security and bond, and to cause the record herein to be removed to said Circuit Court of the United States for the District of Kansas, First Division.

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendants Westinghouse,
Church, Kerr & Company.

ANGEVINE & CUBBISON,
Attorneys for the Defendant The Proctor
and Gamble Company.

State of Missouri,
County of Jackson—ss.

C. S. Crysley, being duly sworn, upon his oath states, that he is agent and attorney of the above named petitioners, Westinghouse, Church, Kerr & Company, and that the Proctor and Gamble Company, corporations, and makes this affidavit on their behalf; that he has read the foregoing petition for removal of said cause to the United States Circuit Court and knows the contents thereof and that the matters and things therein contained are true.

C. S. CRYSLER,

Subscribed and sworn to before me this 20 day of January, 1905.

[Seal] LENDRUM B. RIDGE,
Notary Public.

My term expires Sept. 15, 1906.

Endorsed: No. 18514. Petition for removal. Filed Jan. 21, 1905. Wm. Needles, Clerk, by D. C. McCombs, Deputy.

In the District Court of Wyandotte County, Kansas.

14 Eugene C. Kreigh, Plaintiff.

vs.

Westinghouse, Church, Kerr & Company a corporation, and the Proctor and Gamble Company, a corporation, defendants.

Bond for Removal of Cause to the United States Circuit Court.

Know all men by these presents:

That the Westinghouse, Church, Kerr & Company, a corporation, and the Proctor and Gamble Company, a corporation, as principals and American Surety Company of New York as sureties, are held and firmly bound unto Eugene C. Kreigh, in the penal sum of five hundred dollars ($500.00) for the payment of which well and truly to be made, we bind ourselves, our successors, representatives, heirs and assigns, jointly and severally, firmly by these presents, upon this condition, that the said Westinghouse, Church, Kerr & Company, and the Proctor and Gamble Company, having petitioned the District Court of Wyandotte County, State of Kansas, for the removal of a certain cause therein pending, wherein Eugene C. Kreigh is plaintiff and Westinghouse, Church, Kerr and Company, and the Proctor and Gamble Company are defendants to the Circuit Court of the United States, for the District of the State of Kansas.

Now, therefore, if the said Westinghouse, Church, Kerr & Company and the Proctor and Gamble Company, shall enter

into the Circuit Court of the United States for the District of the State of Kansas, First Division, on the first day of its next session, a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of January, 1905.

WESTINGHOUSE, CHURCH, KERR & COMPANY [Seal]

And THE PROCTOR AND GAMBLE COMPANY [Seal]

By Harkless, Crysler & Histed, their attorneys. [Seal]

AMERICAN SURETY COMPANY OF NEW YORK [Seal]

By Robert F. Porter, Resident Vice President. [Seal]

Attest: C. E. HERSH,
[Seal] Resident Asst. Secretary.

Endorsed: No. 18514. Bond for Removal. Filed Jany. 21, 1905. Wm. Needles, Clerk, by D. C. McCombs, Deputy.

In the District Court of Wyandotte County, Kansas.

Eugene C. Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr & Company, a Corporation, and The Proctor & Gamble Company, a Corporation, Defendants.

Order for Removal.

The defendant herein, having within the time provided by law, filed their petition for removal, of this cause to the Circuit Court of the United States for the District of Kansas, First Division, and having at the same time offered their bond in the sum of Five Hundred Dollars, with the American Surety Company of New York, as surety, pursuant to statute and conditioned according to law; now, therefore, this court does hereby accept and approve said bond and accept the petition, and does order that this cause be removed for trial to the next term of the Circuit Court of the United States for the District of Kansas, First Division, pursuant to the statute of the United States, and that all other proceedings in this court be stayed.

J. McCABE MOORE, Judge.

I, Wm. Needles, Clerk of the District Court, do here-
17 by certify that the foregoing is a full, true and correct transcript of the record and the pleadings in the within entitled cause as the same remain of record and on file in my office this 13'' day of February, 1905.

[Seal]

WM. NEEDLES,
Clerk District Court.
By E. J. Cable, Deputy.

Endorsed: No. 8323. Eugene C. Kreigh, Plaintiff, vs. Westinghouse, Church, Kerr & Co. et al., Defendant. Filed June 5, 1905. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District
18 of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr & Company, and The Proctor & Gamble Company, Defendants.

Separate Answer of Defendant Westinghouse, Church, Kerr & Company.

Now comes Westinghouse, Church, Kerr & Company, and for its separate answer to the petition of plaintiff herein filed—

I.

Denies each and every allegation in said petition contained.

II.

For its second and further answer and defense to plaintiff's said petition, said defendant states that the injuries, if any, to plaintiff were caused by the careless, negligent and reckless acts and omissions of plaintiff.

III.

For its third and further answer and defense to plaintiff's said petition, said defendant states that plaintiff's injuries, if any, were received by him while in the employ of the defendant, all the risks and dangers of which employment, together with the risk and danger of being injured in the manner in which he was injured, if he was injured, were well known to plaintiff and he, plaintiff, assumed all such risks and dangers as a part of his employment.

IV.

For its fourth and further answer and defense to plaintiff's said petition, said defendant says that plaintiff's injuries, if any, were caused by the acts of a fellow servant, or fellow servants of plaintiff.

Wherefore, having fully answered, defendant prays
19 to be discharged with its costs.

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendant,
Westinghouse, Cuurch, Kerr & Co.

Endorsed: No. 8323. Eugene C. Kreigh vs. Westinghouse, Church, Kerr & Co. et al. Separate answer of the Westinghouse, Church, Kerr & Co. Filed June 5, 1905. Geo. F. Sharitt, Clerk.

United States of America,
20 District of Kansas,
First Division—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, First Division, began and held at the City of Leavenworth, in said District on Monday the 5th day of June, A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:—

Monday, June 5, 1905.

Eugene C. Kreigh, Plaintiff,
8323 vs.
Westinghouse, Church, Kerr & Company, and The Proctor & Gamble Company, Defendants.

On application of defendants, it is ordered by the court that defendants have thirty days from this date in which to plead herein.

In the Circuit Court of the United States for the District
21 of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr & Company, a Corporation, and The Proctor & Gamble Company, a Corporation,
Defendants.

Answer of Defendant, Proctor & Gamble Company.

Comes now the defendant, Proctor & Gamble Company, and for its separate answer to the petition filed by the plaintiff in the above entitled cause, denies each and every allegation therein contained.

II.

For its second and further answer and defense to the plaintiff's said petition this defendant says, that if the plaintiff received any injuries at the time and place stated in his petition, said injuries were caused by the carelessness and negligence

of the plaintiff in not giving proper attention to the work he was doing and to the work that other workmen about him were doing upon the building which was then being erected.

III.

For its third and further answer and defense to the plaintiff's petition this defendant says, that the condition of the building and of the derrick, and the manner of using the derrick, and all the conditions surrounding the use of said derrick, and all the conditions, surrounding the plaintiff were apparent and obvious to and were well known by the plaintiff, and all of the dangers of his employment, together with all of the risks and dangers of being injured in the manner in which he was injured, if he was injured, were apparent and obvious to and were well known by the plaintiff, and he, said plaintiff, assumed the risk and danger of being injured as part of
22 his employment.

For its fourth and further answer and defense to the plaintiff's said petition the defendant says, that plaintiff's injuries, if any, were caused by the acts of the plaintiff's fellow servants, for which this defendant is not liable.

Wherefore, this defendant prays judgment for costs of suit.

ANGEVINE & CUBBISON,
Attorneys for Defendant,
Proctor & Gamble Company.

Endorsed: No. 8323. Eugene C. Kreigh, Plaintiff, vs. Westinghouse, Church, Kerr & Co. and Proctor & Gamble Company, Defendants. Answer of Proctor & Gamble Co. Filed June 16, 1905. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States in and for the District of Kansas, First Division.

23 Eugene C. Kreigh, Plaintiff

No. — vs.

Westinghouse, Church, Kerr and Company, (a corporation) and The Proctor and Gamble Company, (a corporation) Defendants.

Amended Petition.

Plaintiff for his cause of action states: That defendants are and have been at all times hereinafter mentioned, corporations duly organized, created and existing:

That defendant The Proctor and Gamble Company is the owner of and has control of a certain soap plant in the city of Kansas City, Kansas, with buildings and appurtenances thereto belonging; and that said plant was during the year 1904 in

course of erection and construction for said defendant The Proctor and Gamble Company by said defendant Westinghouse Church Kerr and Company under a contractual relation between said defendants, and that said The Proctor Gamble Company has had a supervising interest in all of said work; that at all times herein stated plaintiff has been in the employ of defendant Westinghouse Church Kerr and Company as foreman of the brick work on said plant.

That on the 25th day of October, 1904, plaintiff was standing on the upper part of one of said buildings about 42 feet above the ground near the north wall thereof, engaged as foreman as aforesaid in the service of defendant Westinghouse Church Kerr and Company in looking after such brick work, and was at such time and place in the exercise of reasonable care and caution.

That at such time that there was in said building certain other workmen of defendants engaged in concreting the roof of said building, and managing, operating and controlling a derrick owned by defendants and used in connection with
24 such concreting work; that plaintiff had no control over and no connection with said concrete workmen on said derrick.

Plaintiff further alleges that on said October 25, 1904, there was a wooden tub or bucket attached by rope to said derrick which was used by the defendants in raising concrete from the ground to the top of said building.

While the plaintiff was engaged as hereinbefore alleged in the performance of his duties on said building he was suddenly and without warning struck by said bucket or tub and knocked from the top of said building headlong to the ground below, a distance of 42 feet, and thereby injured as hereinafter alleged.

Plaintiff's said injuries were caused by the carelessness and negligence of the defendants in this, to-wit:

1. The defendants were careless and negligent in furnishing and operating a defective improper and unsafe derrick to raise, move and lower said tub or bucket;

(a) Said derrick was so constructed and operated that there were no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the North wall of said building, excepting by the employees of the defendants violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building and also move with it said arm.

(b) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

(c) The ropes and pulleys on said derrick were defective insecure and improperly arranged and used.

2. The defendants were careless and negligent in causing and allowing said bucket to be violently pushed and swung against the plaintiff without notice or warning to him.

3. The defendants were careless and negligent in failing to supply and use a system of signals or warnings to notify persons on the building when the derrick, tub or bucket were to be moved, raised or lowered.

By reason of the carelessness and negligenee of the
25 defendants hereinbefore alleged, plaintiff received the following severe and permanent injuries:

Plaintiff's lower jaw was dislocated, fractured, broken and permanently injured; nearly all of his teeth were either knocked out at the time or were so damaged that they have since had to be removed on account of said injuries; that his lips and face were cut and are permanently disfigured; both elbows, his ribs and left foreleg were bruised, and are permanently injured; plaintiff was, and has for a long time been confined to his bed, and has suffered pains in his side, difficulty in breathing, pains in his legs, inability to chew food or move his jaw, and has been troubled with difficulty in swallowing on account of said injuries. Plaintiff has suffered by reason of all of which both great bodily and physical pain and mental anguish, and has lost and will in future lose a great deal of time from his business and in looking after his affairs, and has expended and will in the future expend large sums of money in medical attention and medicines, and nursing in connection with such wounds and injuries, and has been permanently injured in all to plaintiff's damage in the sum of Fifteen thousand ($15.000.00) dollars.

Wherefore, plaintiff prays judgment against defendants for the sum of Fifteen thousand ($15.000.00) dollars, and for costs of this action.

ELLISON, & TURPIN, and
McFADDEN & MORRIS,
Attys for Plaintiff.

Rec'd copy of this of this petition June 29th, 1905 & consent to its filing at once without order of court.

HARKESS, CRYSLER & HISTED,
Attorneys for Deft.,
Westinghouse, Church Kerr & Co.

ANGEVINE & CUBBISON.
Attys for the Proctor & Gamble Co.

Endorsed: No. 8323 Circuit Court of the U. S. for the District of Kansas, First Division. Eugene C. Kreigh, plff. vs. Westinghouse, Church, Kerr & Co. a corporation and The Proctor and Gamble Co., a corporation. Dfts. Petition. Filed July 1, 1905 Geo. F. Sharitt, clerk Ellison & Turpin, and McFadden & Morris, attys. for Plff.

26 In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff.
No. 8323 vs.
Westinghouse, Church, Kerr & Co., and Proctor & Gamble Company, Defendants.

Answer to Amended Petition.

Comes now the defendant, Proctor & Gamble Company, and for its separate answer to the amended petition filed herein by the plaintiff, says:

I.

It denies each and every allegation in said amended petition contained.

II.

For its second and further answer and defense to the plaintiff's said amended petition this defendant says, that if the plaintiff received any injuries at the time and place stated in his petition, said injuries were caused by the carelessness and negligence of the plaintiff in not giving proper attention to the work he was doing and to the work that other workmen about him were doing upon the building which was then being erected.

III.

For its third and further answer and defense to the plaintiff's amended petition this defendant says, that the condition of the building and of the derrick and the manner of using the derrick, and all of the conditions surrounding the use of said derrick, and all of the conditions surrounding the plain-

tiff were apparent and obvious to and were well known by the plaintiff, and all of the dangers of his employment, together with all of the risks and dangers of being injured in the manner in which he was injured, if he was injured, were apparent and obvious to and were well known by the plaintiff, and
27 he, said plaintiff, assumed the risk and danger of being injured as part of his employment.

IV.

For its fourth and further answer and defense to the plaintiff's amended petition, the defendant says, that the plaintiff's injuries, if any, were caused by the acts of the plaintiff's fellow servants, for which this defendant is not liable.

Wherefore, this defendant prays judgment for costs of suit.

ANGEVINE & CUBBISON,
Attorney for Defendant,
Proctor & Gamble Company.

Endorsed: No. 8323. Eugene C. Kreigh, vs. Westinghouse-Church, Kerr & Co. and the Proctor Gamble Co. answer of The Proctor Gamble Co. to amended petition Filed July 3, 1905. Geo. F. Sharitt, clerk.

28 In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff.
vs.
Westinghouse, Church, Kerr & Company and the Proctor & Gamble Company, Defendants.

Separate Answer of Defendant Westinghouse, Church, Kerr & Company to Plaintiff's Amended Petition.

Now comes Westinghouse, Church, Kerr & Company, and for its separate answer to the amended petition of plaintiff herein filed.

I.

Denies each and every allegation in said amended petition contained.

II.

For its second and further answer and defense to plaintiff's said amended petition, said defendant states that the injuries, if any, to plaintiff were caused by the careless, negligent and reckless acts and omissions of plaintiff.

III.

For its third and further answer and defense to plaintiff's

said amended petition, said defendant states that plaintiff's injuries, if any, were received by him while in the employ of the defendant, all the risks and dangers of which employment together with the risk and danger of being injured in the manner in which he was injured, if he was injured, were well known to plaintiff and he, plaintiff, assumed all such risks and dangers as a part of his employment.

IV.

For its fourth and further answer and defense to plaintiff's said amended petition, said defendant says that plaintiff's injuries, if any, were caused by the acts of a fellow ser-
29 vant, or fellow servants of plaintiff.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

A. L. BERGER,
HARKLESS, CRYSLER & HISTED,
Attorneys for defendant,
Westinghouse, Church, Kerr & Company.

Received a copy of the foregoing answer to amended this 30 day of June, 1905 and we hereby consent that same be filed.

ELLISON & TURPIN,
Attys. for Plaintiff.

Endorsed: No. 8323 Eugene C. Kreigh vs. Westinghouse, Church Kerr & Co. Separate answer to amended Petition. Filed July 5, 1905. Geo. F. Sharitt, clerk.

30 In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff
No. 8323 vs.
Westinghouse, Church, Kerr & Company, et al Defendants.

Reply.

Plaintiff for reply to the separate answer of the defendant. The Proctor and Gamble Company, filed herein, denies each and every allegation therein contained.

ELLISON & TURPIN,
McFADDEN & MORRIS,
Attorneys for Plaintiff.

We consent to the filing of this Reply this 27th day of July, 1905.

ANGEVINE & CUBBISON,
Attorneys for Defendant,
The Proctor and Gamble Company.

Endorsed: No. 8323. In the Circuit Court of the U. S. for the District of Kansas, First Division. Eugene C. Kreigh Plff. vs. Westinghouse, Church, Kerr & Co. et al. Defts. Reply. Filed July 27, 1905. Geo. F. Sharit, Clerk. Ellison & Turpin and McFadden & Morris, Attys for Plff.

31 In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
No. 8323 vs.
Westinghouse, Church, Kerr & Company, et al., Defendants,

Reply.

Plaintiff for reply to the separate answer of the defendant, Westinghouse, Church, Kerr & Company filed herein, denies each and every allegation therein contained.

McFADDEN & MORRIN,
ELLISON & TURPIS,
Attorneys for Plaintiff.

We consent to the filing of this Reply this 27 day of July, 1905.

HARKLESS, CRYSLER & HISTED,
Attorneys for defendant, Westinghouse,
Church, Kerr & Company.

Endorsed: No. 8323. In the Circuit Court of the U. S. for the District of Kansas, First Division. Eugene C. Kreigh, Plff vs Westinghouse, Church, Kerr & Co. et al. Defts. Reply filed July 28, 1905 Geo. F. Sharitt, clerk. Ellison & Turpin, and McFadden & Morris, attys. for Plff.

32 United States of America,
District of Kansas, First Division—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the City of Topeka in said District, on Monday the 27th day of November A. D. 1905, proceedings were had and appear of record in words and figures as follows, to-wit:

Saturday, December 2, 1905.

Eugene C. Kreigh, Plaintiff,
8323 vs.
Westinghouse, Church, Kerr & Company and The Proctor and Gamble Company, Defendant.

On motion of the plaintiff, it is ordered by the court that this action be and the same is hereby dismissed as to the defendant, The Proctor & Gamble Company.

33 United States of America,
District of Kansas, First Division—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Topeka, in said District and Division, proceedings were had, and appear of record in words and figures as follows, to-wit:

Saturday, December 2, 1905.

Eugene C. Kreigh, Plaintiff,
8323 vs.
Westinghouse, Church, Kerr & Company, and the Proctor and Gamble Company, Defendant.

Now comes the plaintiff herein by Ellison & Turpin, and McFadden & Morris, his attorneys, and the defendant by Harkless, Crysler and Histed, its attorneys, and also come a jury, to-wit: G. B. Merritt, L. B. Maddox, Charles Doughty, George Ferrell, Charles E. Gillum, John Null, J. B. Spurlock, William A. Sexson, John Dyche, J. H. Rebstock, W. D. Johnston and J. R. Brooks, twelve good and lawful men of the body of the First Division of the District of Kansas, who being duly empaneled and sworn to well and truly try the matters submitted to them in this action and a true verdict give according to the law and the evidence, and thereupon the trial of this case is proceeded with, and now the plaintiff offers and introduces all his evidence and rests his case; and thereupon the defendant files its demurrer to such evidence upon the ground that the evidence of the plaintiff is not sufficient to establish a cause of action in favor of the plaintiff and against the defendant; and said demurrer was duly presented to the court, and the argument of counsel having been heard thereon, and the court being fully advised in the premises, sustains said demurrer, to which ruling of the court, the plaintiff at the time excepted; and thereupon it was ordered, adjudged and decreed by the court that the plaintiff take nothing by his said action, and that the defendant have judgment against the plaintiff for its costs herein taxed at . . . . . dollars.

34 To which order and judgment of the court, the said plaintiff now here excepts. It is further ordered by the court that the plaintiff have sixty days from this date in which to prepare and present bill of exceptions herein.

35 In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr and Company, Defendant.

Demurrer to Evidence.

Now comes the defendant, Westinghouse, Church, Kerr and Company, the plaintiff having introduced his evidence and rested, and demurs thereto for the reason that the same does not show any cause of action in favor of the plaintiff against the defendant, as set out in plaintiff's petition,

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendant.

Endorsed: #8323 Kreigh vs. Westinghouse Church Kerr & Company. Demurrer to evidence. Filed Dec. 2, 1905 Geo. F. Sharitt, clerk.

36 In the Circuit Court of the United States in and for the District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
No. 8323 vs.
Westinghouse, Church, Kerr and Company, a corporation, and the Proctor and Gamble Company, a corporation,
Defendants.

Motion for New Trial.

Now comes plaintiff above named and moves the court to set aside the verdict of the jury rendered herein and grant a new trial of this cause for the following reasons:

1. Irregularity in the proceedings of the court, jury and prevailing party by which the plaintiff was prevented from having a fair trial.

2. Misconduct of the jury and prevailing party.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Because the verdict is not sustained by sufficient evidence.

5. Because the verdict is against the evidence.

6. Because the verdict is contrary to law.

7. Because of newly discovered evidence material for the plaintiff which he could not with reasonable diligence have discovered and produced at the trial.

8. Because of error of law occurring at the trial and excepted to by the party making the application.

Affidavits and other evidence will be offered in support of this motion at the hearing hereof.

McFADDEN & MORRIS,
Attorneys for Plaintiff.

Endorsed: 8323 Eugene C. Kreigh, Plff. vs. Westinghouse Church, Kerr & Co. et al. Motion for new trial. Filed Dec. 5, 1905. Geo. F. Sharitt, Clerk. McFadden & Morris, Attys for Plff.

In the Circuit Court of the United States for the District
37 of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
No. 8323 vs.
Westinghouse, Church, Kerr & Company, a Corporation, and The Proctor-Gamble Company, a Corporation, Defendants.

Now upon this 8th day of January, 1906, upon the application of the plaintiff and for good cause shown, the time in which to prepare and file a bill of exceptions in the above entitled cause for the purpose of appealing the same to the United States Circuit Court of Appeals Eighth Circuit, is hereby extended to and including March 1st, 1906.

JOHN C. POLLOCK, Judge.

Endorsed: No. 8323. In the Circuit Court of the United States for the District of Kansas, First Division. Eugene C. Kreigh, Plff. vs. Westinghouse, Church, Kerr & Co. et al. Defts. Order extending time for Bill of Exceptions. Filed Jany. 8, 1906. Geo. F. Sharitt, Clerk. Ellison & Turpin and McFadden & Morris, Attys. for Plff.

In the Circuit Court of the United States in and for the
38 District of Kansas, First Division.

Eugene C. Kreigh, Plaintiff,
No. 8323 vs.
Westinghouse, Church, Kerr & Company, a Corporation, and The Proctor & Gamble Company, a Corporation, Defendants.

The plaintiff's motion for a new trial having been heretofore submitted to the court with leave to the parties to file briefs, now on this day the court having carefully considered said motion, and being well advised in the premises, it is by the court considered, ordered and adjudged that said motion be and the same is overruled. To which order and judgment of the court the plaintiff now here excepts.

JOHN C. POLLOCK, Judge.

Endorsed: 8323. Order overruling motion for a new trial. Filed Jany. 26, 1906. Geo. F. Sharitt, Clerk.

In the Circuit Court of the United States for the District
39 of Kansas, First Division.

November Term, 1905. Topeka, Kansas.
Before Honorable John C. Pollock, Judge.

Eugene C. Kreigh, Plaintiff,
No. 8323 vs.
Westinghouse, Church, Kerr & Company, a Corporation, and The Proctor & Gamble Company, a Corporation, Defendants.

Bill of Exceptions.

Be it remembered, that at the November, 1905, term
40 of said Circuit Court of the United States for the District of Kansas, sitting in and for the First Division thereof, and on Saturday, the second day of December, 1905, thereof, the above entitled cause came duly on to be heard before the Honorable John C. Pollock, Judge, and a jury duly impaneled and sworn to try said cause.

Appearances:

The said plaintiff, Engene C. Kreigh, appeared in person and by his solicitors, Mr. R. E. Morris, of McFadden & Morris, and Mr. Rees Turpin, of Ellison & Turpin.

The said defendants, Westinghouse, Church, Kerr & Company, appeared by Mr. Clifford Histed, of Harkless, Crysler & Histed, its solicitors.

Statements of the Case.

Thereupon, Mr. Rees Turpin, of counsel for plaintiff, made to the jury a statement of the case on behalf of the said plaintiff.

Thereupon, Mr. Clifford Histed, of counsel for the defendant, made to the jury a statement of the case on behalf of the said defendant.

Thereupon the plaintiff, to maintain the issues upon
41 his part, produced and offered in evidence as follows:

Eugene C. Kreigh, the plaintiff, called as a witness in his own behalf, was first duly sworn, and testified as follows.

Direct Examination.

Questions by Mr. Turpin.
Q. Mr. Kreigh, you are the plaintiff in this action?
A. I am.

Q. What is your occupation, Mr. Kreigh?
A. I am a bricklayer.
Q. Where were you employed on October 25, 1904?
A. At Proctor & Gamble's soap plant, Armourdale, Kansas City, Kansas.
Q. What were you doing there?
A. I was in charge of the brick work there.
Q. On what? A. On the boiler room and pump house—the machinery power plant that was being erected at that time.
Q. By whom were you employed?
A. Westinghouse, Church, Kerr & Company.
Q. In what capacity? A. As foreman.
Q. Of what? A. Of the brick work.
Q. What kind of a building was this? Can you state about the dimensions of it?
A. It was what is known as a partial steel construction, the steel work going up and forming all supports of the building.
Q. I mean the dimensions of the building.
A. I cannot state [positive] without plans. It was
42 probably one hundred and thirty or forty feet long, by fifty feet wide. That would be the outside dimensions.
Q. About how high had it been built at this time?
A. The steel work was all up—that is, all steel that rested on steel was up to the height of forty-two feet and probably a few inches—within a few inches of that distance would be the height of the steel from the ground.
Q. Can you state just what the condition of the building was, the stage of construction on this date?
A. My recollection is that the steel was all in place. The brick work was done on two batteries of boilers. There was three batteries set at the time of the steel construction, and two of them were completed and one was nearly completed. The building was not level---it was out of level; the brick work on the north was from thirty-five to thirty-nine feet high, as it was built up in sections along. The wall on the east end ---or the east of this building proper only went up what might be termed one story. The building for the power plant doesnt go up only one story. The pump house was only one story high, and on that the brick work was finished. On the east side there was dust flues---not dust flues, but coal flues, going away from the boilers, and that was partially completed. There was quite a bit of work to do yet on that side.
Q. Describe the steel construction of this building, just briefly telling in a general way what it was and how it was erected. A. The steel construction consisted of steel columns. They were steel built up out of angle iron and different shapes of iron rivetted together to form the supports for the building and also for the machinery. The building proper was simply

a house for protection to the machinery and boilers, and the boilers come in connection and were built right in. The whole building was built right up together.

43 Q. They were upright columns? A. Yes, sir, with steel beams running across different places to form coal bunkers and form floors and roofs, and then the [brock] work to protect that steel on the outside from the weather; it was all covered with [brock] work. The brick work went up around it to keep the weather away from it and to enclose the building in between—what is commonly termed curtain walls in between supports.

Q. How long had you been working there just prior to the injury? A. My recollection is I had worked six days just prior to the injury. However, I had worked previous to that time. I had started the job, but I had been off three weeks or about that, and I had only been back to work about six days.

Q. Where had you been working during that time?

A. Working on the boilers mostly, and on the wall. When I returned the wall on the extreme west end of the building was the low part of the north wall. The bricklayers were working on that and the boilers, and just previous to the accident, probably a day, we had done some work on the east end of the building, and at the time of the accident was working on the north wall along near the east end.

Q. How were you injured, Mr. Kreigh?

A. I was simply knocked off the building and fell forty-two feet.

Q. What knocked you off?

A. A bucket—a concrete bucket.

Q. Where were you standing when you were struck by that bucket? A. I was standing on a board that was lying right over the north wall, or just so it would clear the north wall—so the wall could pass it---when it struck me.

Q. Which way were you looking?

A. I was looking north.

Q. What were you doing there? Why were you there?

A. I was there directing some laborers in the building of a scaffold, getting ready to [-] bricklayers on top so as they could reach down and get this wall up.

44 Q. What kind of laborers were they?

A. They were hod carriers.

Q. What department or work were they engagel in?

A. They were in the brick gang---they were my laborers, and what I would term scaffold laborer [.r] scaffdd builders. They were the laborers I would take out of the res of the hod carriers to build the scaffold.

Q. Where were those brick men working?

A. The rest of the gang beside the men I had on top?

Q. Yes? A. They were working down below. They were underneath. They were bunched; most of them were right immediately under the board I was putting down. This scaffold ran along there about sixty feet, I think. However, some of them were further on toward the west end, finishing up some work there.

Q. On this day and prior to this time, where had the bricklayers and the laborers and the men engaged in the brick work been working with reference to being above, on the level with, or below the top steel beams that were then placed there?

A. They had been working below. They had no brick work above. We hadn't got up to those steel beams.

Q. How long had you been there on this work?

A. Do you mean the time I went up there and was knocked off?

Q. Yes. A. I couldn't say positive; probably from three to five minutes.

Q. Which way were you looking during that time?

A. I was looking along this wall, directing the scaffolding. I could not say positive, but I probably looked—My general view would be east, west and north.

Q. You were on the north wall? A. I was on the north wall, building that scaffold right over the men.

Q. From which direction did the bucket come?

A. It came from the south.

45 Q. Did you hear any signal or warning?

A. Not before the bucket struck me. I heard some remark from someone just as it hit me, just as I was going over the wall. I don't know where that came from.

Q. You don't know who it was?

A. I don't know who it was.

Q. You fell from the wall to the ground? A. I fell from the top of the steel structure to the ground. The wall was below the steel structure.

Q. Did you strike anything in going down. A. I struck a coal conveyor. There was a steel coal conveyor, or brackets fastened into the building below, to carry up an endless chain with buckets on, that went up to carry coal to the bunkers. It went up at an angle on the side of the building, bolted on, and about half way to the ground was where I encountered that. At the point I went over, it was probably twenty feet below where I was and twenty or twenty-two feet from the ground. I struck the edge of that as I went down---just grazed it, so far as I know.

Q. Where did you strike when you got to the ground?

A. I don't know as I could say positive. I struck the ground.

Q. What injury resulted from that fall? A. Well, my injuries were a broken jaw—this jaw was broken in two. The jaw was dislocated. Of course, I couldn't examine myself, but I knew I was all out of shape. This jaw stood out here (indicating); I could see my own jaw bone holding my face out. My teeth were all hanging here in front, and I put my hand to my face and found I was all caved up there (indicating). This lip (indicating) was cut entirely off or severed with the exceptions of each side. It was cut clear through to the inside and it was just hanging, just a roll of [clesh] there. I was bruised up generally all over, more or less. My arms were bruised under here as though I had in some way
46 hooked them over something or fell on something. This leg (indicating) was skinned from along down there somewhere (indicating)—from just above the ankle to pretty near the knee, and was badly bruised in the fleshy part. My finger nails were all jammed up on my left hand; every one of them was broken just as though they had hit something.

Q. Were any of your teeth removed? A. Not at that time. The teeth were loose; in fact, the two upper teeth were just hanging and apparently just ready to drop out.

Q. Were they afterwards taken out? A. They were afterwards taken out, but that was done sometime later. They were shoved back at the time. The men on the job shoved them right back to into place. There was a little fellow there that claimed he graduated as a osteopath, and he was among the first to get to me, and told me to be quiet, that he believed he could save those teeth, and he shoved them into place. I remember that.

Q. How long were you laid up? A. I was off duty entirely and didnt do anything from the 25th of October to the 10th of March. I went to work on the 10th day of March at 10:30.

Q. You may state whether or not you had any difficulty in taking food, from this injury? A. Yes sir, I had great deal of difficulty. From the time I was injured up until the first of March—from the 25th of October to the first of March, I could take no solid food whatever, nothing that I must chew or grind in any way with my teeth, and from the 25th of October until about—well, it was somewhere the latter part of February—I cant give the dates—my teeth were wired together absolutely rigid and there was absolutely no movement whatever. They were clamped solidly together, with bands around the teeth above and below, amd they had a little knob sticking out of those bands, and they wrapped wire around that, which held my teeth in one position.

Q. Held your two jaws together? A. Yes. The
47 upper jaw was wired to the lower jaw—or the lower jaw to the upper jaw, rather, and all the food I got was gruels and soups and such as that I could suck through a tube sticking between my teeth where those two teeth were out.

Q. You may state whether or not you had any trouble with your tongue from this accident? A. I suffered more from my tongue or some injury to my throat. From the time that the accident occurred I seemed to have a cough. I seemed to have—well, it had the appearance of a cold. I dont suppose it was a cold. There was something wrong with my throat, and I would strangle and cough a great deal, which would work those parts of the bone and that would hurt fearfully. About three or four days after the accident I began the strangling. If I would go to take water, I had to be very careful when I would swallow. I could swallow all right, but as soon as I would go to catch my breath after a swallow, I would simply strangle. It seemed as though there was something in there that would strangle me, and I would start to cough and keep coughing and coughing until I didnt have any more breath or strength to cough. That condition existed up to about the—say the 6th—I think it was the 6th of November, if I remember right; anyhow, six or seven days after I was hurt. Then it got so I couldnt swallow at all; I absolutely could not swallow. If I did, or even tried to swallow saliva that would gather in my my mouth, I would start to strangle, and for about forty-eight hours I could not take any nourishment whatever, even water. Nothing passed into me, and my tongue seemed to draw right down into my neck; I couldnt reach my front teeth with my tongue. It seemed to become paralyxed: I couldnt work it or move it. It wouldnt even reach the roof of my mouth. It was just like a knot. I had no control over it.

Q. You may state whether or not there was any ulceration from any of these injuries? A. Oh, there was some discharge. I left out one of the injuries. I was cut right
48 under the chin. There was a cut or gash there that went in pretty deep, and that gathered slightly and run right at the first. Then it healed up, and that was healed up by the—Oh, in five or six days—and quit discharging. There was no suppuration set in in the lip at all.

Q. You may state whether or not you suffered any pain?

A. Certainly I suffered pain. Those strangling spells—I dont know how a man could suffer any more. I suffered death every time one of those struck me. I went as long as I had any breath left in [my] to go.

Q. State whether or not you suffered any pain from the fracture of your jaw? A. Yes, I suffered pain from the frac-

ture of the jaw? The fracture was painful. However, I will say that it was not as painful as I expected it to be.

Q. Have you recovered the full use of your jaw. A. No sir.

Q. Can you open your mouth now as you did before?

A. I can open it pretty near; I can open nothing like full.

Q. To what extent can you open it. A. (Witness opens mouth)

Q. What doctors did you have? A. I was first attended by Dr. Fairbank. He got to me within probably twenty minutes after the injury. He was called by some one on the job.

Q. Who else? A. Then he sewed me up and directed me to be taken home and told me when he was leaving to call another physician and a dentist. I had Dr. Jackson and Dr. Allen. Dr Jackson is a surgeon and Dr. Allen is a dentist. When I was strangling, I called in Dr. McKee, a throat specialist, and he examined the condition of this throat to see why the throat was closing up and I couldnt swallow.

Q. How long did Dr. Jackson treat you? A. Dr. Jackson called sometimes twice a day, and kept lengthening it out —I think it was something like six weeks that Dr. Jackson was in attendance.

49 Q. How long did Dr. Allen, the dentist, attend you?

A. He attended me up until probably, I think, the 4th or 5th of March. The last thing he did for me he made this [place], made them two teeth, and stuck it in. That was the last professional thing he did for me. He told me I would probably have to wait a year before he could do anything more for the teeth unless they gave me trouble, as the jaw would not permit the fixing of the dental work.

Q. How old are you, Mr. Kreigh? A. I am forty years old.

Q. What pay were you receiving at that time for your work? A. Six dollars a day.

Cross-Examination.

Questions by Mr. Histed.

Q. Have you a trade? A. Yes sir.

Q. What is it? A. I am a bricklayer.

Q. How long have you followed that trade? A. I went to laying brick in 1887.

Q. You have followed that trade continuously since?

A. No sir. My general occupation has been along that line.

Q. During this time, I take it, you have become so proficient you have been in charge of men laying brick, as foreman?

A. Oh, yes. I have acted in the capacity of foreman of brick work, yes sir.

Q. You have had a large experience, I presume, in the construction of buildings and working around buildings?

A. I dont know whether it would be termed large. I have had at least the average of experience of a bricklayer following the trade during that time, yes.

Q. Have you followed that trade, either as a bricklayer or foreman in charge of men, practically since you began in 1887? A. Yes.

Q. How long had you worked for Westinghouse, Church, Kerr & Company? A. I went to work for them the first week in September.

Q. Had you ever worked on other jobs for them?

A. No sir.

Q. They had this job of building this building for the Proctor-Gamble Company, as I understand you? A. That is my understanding.

Q. And all the men there were employed by and working for Westinghouse, Church, Kerr & Company? A. I dont know.

Q. Is that as you understood it? A. I didnt understand anything about that.

Q. For aught you know, these concrete men or roofing men were not their employes at all? A. I supposed they were, but I do not know.

Q. You know nothing about that? A. No, sir.

Q. Did you see any other men in charge, apparently exercising any control, except men under the employ of Westinghouse, Church, Kerr & Company? A. Yes.

Q. Do you know whether, as a matter of fact, Proctor & Gamble were doing part of this work and Westinghouse, Church, Kerr & Company the balance? A. I dont know.

Q. You dont know anything about that at all?

A. No, sir.

Mr. Histed: The defendant will state that Westinghouse, Church, Kerr & Company were building this entire building and had charge of the entire work, and all those men were under their employ.

The Court: That is, the concrete men as well as the brick men?

Mr. Histed: Yes sir, the concrete men as well as the brick men.

Q. You had been off of this job for a little while, as I understand? A. Yes sir.

Q. Had you been working for Westinghouse, Church, Kerr & Company some other place? A. No sir.

Q. Just laying off? A. I was laying off; I had been hurt on the job and met with an accident, and got this mark here

(indicating). A timber had fell from somewhere above and hit me on the jaw and that laid me up for three weeks.

Q. When did you get back to work? A. I got back just a week before I got hurt again.

Q. You had, of course, seen this derrick up there while you were at work? A. I had seen it.

Q. How many days before had you first been up on the beams or roof? A. I probably was upt here three or four days before.

Q. Were you up there more or less frequently during those days? A. No sir.

Q. How many times during those three or four days were you on the roof? A. I was up there twice.

Q. Twice during those three or four days before this time you were up there? A. Yes sir.

Q. What were you doing up there the first time you went up? A. I went up to get a measurement at the west end of the building, to see how my brick work was coming up to conform to the iron?

Q. What else were you up there for? A. Then I went up again to lay out the wall at the east end that joined on to the old building, to show an assistant foreman I had there how to bring it up.

Q. Was this derrick in plain view when you were up on top of those roof beams? A. I suppose it was.

Q. You saw it? A. Yes.

Q. There was no obstruction on the top of the beams between you and the derrick? A. I wont be positive about that. The last time there was. There was a monitor
52 sash or skylights for a ventilating system up there, but whether they obstructed the view or not, I dont know.

Q. You had consulted with Mr. Clemm, the general superintendent there, about the advisability of putting a derrick on top of the roof, before it was actually placed there, hadnt you? A. I wouldnt call it a consultation. He came to me before I was put off the first time—probably the second week I had went to work. He says, "Kreigh, how are you going to get this stuff up? It's up to you." I says, "I expect to hod it up." He says, "No, we will have to rig up some way to get it up. I want to get up a lot of concrete, and we may as well hoist your brick stuff, but I thought I would ask you about it, what you thought about it." I suggested to him that we either put in an elevator or a derrick, and I believe that was about the extent of our conversation along that line.

Q. It was your opinion, and so expressed to Mr. Clemm at the time, that in view of the place and location, you could work better with a derrick than you could with an elevator?

A. I dont know as I went that far, to suggest that to him.
Q. You knew what the derrick was for when he placed it there? A. Yes.
Q. Was its location changed at all from the time you went up on the top of the roof two or three days before, until you were injured in this accident? A. I couldnt say.
Q. So far as you know, was it? A. No sir.
Q. So far as you observed, was it standing where it had been standing when you first went on the roof? A. I suppose it was. I didnt observe anything about it.
Q. How long before that had the derrick been actually placed on the roof? A. I dont know.
Q. A week? A. It might have been. I think it was.
Q. Could you see it from the ground? A. Yes sir,
53 you could see the top of the derrick and see the boom sticking out over the wall.
Q. You observed that? A. I had noticed the derrick was up. When I came back to work, after being injured, I observed they had a derrick up there.
Q. Did you know it was actually being used? A. No sir, At what time?
Q. All this time, this week? A. I didnt know that it was used all that week.
Q. You knew it was in use up there? A. No sir.
Q. You did not know that? A. No sir.
Q. Hadnt they been hauling concrete up there for several days? A. I dont know what they were doing for several days. They probably hauled up concrete there for two or three days.
Q. You have testified before in this case, havent you?
A. Yes sir.
Q. I will ask you if you were not asked the question, "What were they doing with the derrick?" and you answered, "Hoisting concrete." A. Yes, they were hoisting concrete at the time of my injury.
Q. I asked you how long before? A. I cant answer that.
Q. As much as a day or two at least? A. Yes.
Q. Was the derrick being used during the two or three days before you were injured that you were up on top of the roof?
A. I couldnt say.
Q. You saw the concrete men up there on the roof, didnt you? A. The concrete men, I dont think were up there when I was up there.
Q. On those two or three days before? A. Oh, no.
Q. Where were they? A. They were on the roof below, over the pump house.
Q. What was the idea of putting up that derrick?
54 A. To hoist concrete and brick.
Q. What was the way in which they operated the

derrick? How did they get the stuff up there? A. They pulled it up by steam power and this derrick.

Q. In what way did they pull it up? A. In a tub.

Q. What was the course of the tub up the wall and over to the place where they dumped it? A. It went up on the north side and was got up to the top and swung around.

Q. It went up on the outside of the wall on the north?

A. Yes sir.

Q. And then across the north wall? A. Yes.

Q. And went over on the roof? A. Yes sir.

Q. And then was dumped where? A. Dumped out there somewhere, wherever they could get to it with barrows. Wherever this tub would swing around, there they would dump it.

Q. Then what would they do with the tub after it was emptied? A. They would send it back down.

Q. So it would go back across the roof and go over the wall and down the outside of the north wall again? A. Certainly.

Q. It had to that extent in its course up the wall and over the wall to the roof, a fixed path, had it not?

A. I would say so.

Q. That is, it would follow the same general line, the derrick being stationary? A. Yes sir, certainly.

Q. When you went up there on the day you were hurt. from where did you go up and how did you get up?

A. I cant answer that.

Q. Do you remember? A. I dont remember whether I went up the ladder or whether I went right off of the scaffold that the bricklayers were working on. They were working so their heads would about touch those beams if they straightened up straight.

Q. How did you get your material up to where those
55 men were? A. We hodded it up with hods.

Q. How did you get the scaffold up? A. Passed that up by hand.

Q. You knew, prior to the time your injury, how this bucket was being raised or lowered there, didnt you?

A. Yes sir.

Q. You were familiar with that practice? A. I was familiar—I saw it going up from below.

Q. I asked you if you were familiar with the way in which they were operating this derrick? A. I would say I was not —not the complete operation.

Q. You were familiar with the way in which the bucket would come up the wall, as you have described it, and go over there, and then it would be returned over the wall?

A. Yes sir.

Q. You knew that? A. Yes sir.

Q. And you were familiar with the way the men would push the bucket out over the wall when it was empty.

A. No sir.

Q. Hadnt you seen the men do that very thing—push the bucket off in that way? A. I dont know that I had.

Q. I will ask you if in your other testimony you were not asked the question, "You had seen those men push the bucket off?" and you answered, "Yes, sir." A. I wont say how I answered that.

Q. I will show you the testimony if you have any doubt it. A. I answered it "yes sir" at that time.

Q. Was that true? A. I cant say positive that it was. I cant say that I had in mind seeing them push it off from this place or seeing them push it off from the roof lower down.

Q. I will ask if you were not asked the further question, "Were you familiar with this method of pushing the bucket out prior to the accident?" and you answered, "yes sir, I would say I was." A. I did.

Q. Was that testimony true when you [have] it? A. It was true to this extent, that I was familiar that the bucket was being pushed out by hand.

56 Q. You were familiar with the method by which they operated this bucket at the time you were up on the wall on that day that you were injured, werent you?

A. To the extent that it was operated by hand.

Q. You knew that when the bucket came up the wall, it would come over a certain definite point on the wall and traverse along to a point where it would be emptied on the roof, didnt you? A. Yes sir.

Q. Then you knew that when that bucket was emptied, the men pushed the bucket back and it would take that same course back over the roof and down the wall, didnt you.

A. No sir.

Q. I dont understand you. Didnt you know that the men would push this bucket back when it would be emptied?

A. No sir.

Q. Havent you just said you were familiar with this method of pushing the bucket prior to the accident. A. Not in that language. I was familiar with the movement of the bucket. I was not familiar with the method of moving the bucket further than it was moved by hand power.

Q. You knew that they had to get that bucket back down to the ground, didnt you? A. Yes sir.

Q. Just tell us how they did get it back down to the ground?

A. I dont know.

Q. What did you see? A. I cant say that I ever seen that bucket actually moved.

Q. What was your understanding about how that bucket would get back? A. I had no understanding about it.

Q. Do you mean to say that you did not know that that bucket would have to go back over the top of that roof and down the wall? A. No sir, I dont mean that.

Q. Did you know that? A. Certainly.

Q. How long had you known that before you were
57 hurt? A. From the time I seen the derrick in operation. That would be the natural or the only course the bucket could take.

Q. What did you do when you went upon the wall? Did you take a fixed position on the wall and stand there all the time, or were you walking back and forth on the wall with your work? A. I was attending to my work.

Q. I havent any doubt about that. A. Yes, sir. I am not a man that gets in a fixed position when I have anything to do.

Q. You were not loafing—I understand that of course. A. No sir.

Q. Were you standing in a definite place all the time or did you move back and forth on the wall? A. I moved around directing the work, as any man would.

Q. You did not, I suppose make any special effort that you should not look south? A. No.

Q. You were not careful not to look at the derrick? A. Oh, no.

Q. You did, of course, in the very nature of things, as you got up there, see that derrick? A. Why, certainly. A derrick sticking up there, a man would see it the same as I would know you were there.

Q. You were walking along, at various times, along the length of this wall? A. Well, yes, I would say a was.

Q. Just a little while before you were hurt, you knew the bucket of concrete had come up, didnt you? A. I cant say that I did.

Q. Will you say that you did not? A. I cant answer that positive.

Q. Didnt you testify in your deposition that you did understand or have a recollection that a bucket of this concrete had come up and was being unloaded just prior to the time you were hit? A. I dont think I did.

Q. I will ask you if you didnt testify as follows: "Q. At the time you were injured, did you know the bucket was
58 up on top? A. Yes sir, I have a faint recollection that the bucket was on top. As a matter of fact, it was on top or it couldnt have hit me." Did you answer that? A. I think so.

Q. "But you have a faint recollection that you saw or that you knew the bucket was on top just before you were struck?

A. Yes sir." Did you answer that way? A. I think I did; I think that is correct.

Q. Was the further question asked: "And you knew that at the time yon were up there that the bucket was up?" and you answered, "Yes, sir." Did you give that testimony? A. I may have given it.

Q. Is it true? A. It is true from that point of reasoning. I probably answered that question — Will you allow me to qualify my answer to that?

Q. Yes, qualify it as you like. A. Yes, I knew it was up there, and probably answered the question as you say, reasoning from the fact that it could not have knocked me off if it hadnt been up there, and that as a matter of fact it must have been up there and that I knew it was there.

Q. You also made a statement in this matter at one time, did you not? A. I believe I did—I beg your pardon. I made a statement, but not an affidavit.

Q. Didnt you say in that statement that you expected as a natural consequence that the bucket would be pushed out after it was dumped, but thought they would give you some signal first? A. I dont remember ever making any statement of that kind.

Q. Will you say you did not make that statement? A. I cannot remember of making that statement.

Q. What is the fact with reference to whether that was true or not? A. It was not true.

Q. So you were not expecting any signal? Is that the idea? A. I cannot say that I was expecting anything.

Q. Now, how long before you were hit had you been
59 . standing right where you were when you were struck?
A. I could not answer that.

Q. Give us your best knowledge—just how long you had been there? A. I could not say positively. I might have been there thirty seconds or half a minute.

Q. Do you know whether or not the bucket had been started toward you before you had stepped into its path? A. No sir.

Q. You dont know that? A. No sir.

Q. So far as you know, you may have stepped right in front of that bucket as it was starting toward you? A. I dont think I could have done that.

Q. The question is do you know whether or not that is the fact? A. I cant state positive on that.

Q. You do not know, as a matter of fact, whether the bucket was actually being shoved off by the men at the time you walked right in front of it, do you? A. No, I do not.

A. You do not know anything about that? A. No sir.

Q. And you think you may have been in that position as much as thirty seconds? A. Probably thirty seconds—something like that.

Q. You had just fairly stepped into this place when you were hit by the tub? A. I had stepped into that place and was looking right down on the wall. My attention at the time I was hit was on a guy line that run out to a gin pole the iron men were using. I was looking at that guy line. How long I stood there looking, I cant answer.

Q. You paid no attention to the bucket or what the men were doing with it when you walked into that place? A. I couldnt say that I did.

Q. Well, did you, Mr. Kreigh? A. No sir.

Q. You were, to that extent, sort of lost to the situation around you, in your intentness upon this guy line down
60 below? A. Probably that was about it. My mind was occupied in thinking of this guy line.

Q. Your mind was occupied with your work and this guy line down below, and you were not attentive to your surroundings upon the roof? A. That might have been the fact.

Q. That is the fact, is it not? A. I think so.

Re-Direct Examination.

Questions by Mr. Turpin.

Q. You say you had been up on this building twice before the time of this accident? A. Yes sir.

Q. Where were you the first time? A. The first time I was on the west end of the main building.

Q. How far was that from where this derrick stood? A. Probably seventy-five or eighty feet.

Q. Did you see the derrick in operation that day? A. No sir.

Q. The other time you were there, where were you? A. I was on the east end of the building.

Q. What were you doing there? A. I went up there to show a man how to bring up a wall, how to finish a wall and get it ready to finish off.

Q. Did you see the derrick in operation that day? A. No sir.

Q. Had you ever seen this derrick in operation from the top of the building? A. No sir.

Q. Had the brick men or any of the bricklayers or any of the laborers connected with the bricklayers used this derrick prior to the time you were hurt? A. No sir.

Q. Were you there when the derrick was put up? A. No sir, I think not.

61 Q. How were you getting your material up to your brick men?

A. In hods; using hod-carriers exclusively

Q. Up ladders? A. Yes, sir, hodding it up ladders.

Q. At this place where you were when you were knocked off, how much space did you cover?

A. With the scaffold I was building?
Q. Yes. A. My recollection is— Well, we didnt have the scaffold completed. We had only just one up there. My recollection is there was two boards part of the way through and one all the way through, and that I was standing where there was two boards laid down—two-by-tens.
Q. How long had you been up there altogether?
A. Probably from three to five minutes.
Q. Did you know, prior to the time you were hurt, how many ropes they had on that boom? A. No, sir.
Q. Did you know prior to the time you were hurt, whether or not they had a lever on that boom? A. No, sir.
Q. Did you know what was the method of controlling that derrick and boom, prior to the time you were hurt?
A. No, sir, not other than it was simply controlled by hand.

Questions by the Court.

Q. As a matter of fact, if those men who were pushing that bucket there had notified you, standing where you were, that they were swinging that bucket out there, you could have gotten out of the way and not been hurt? That is true, is it not? A. Certainly.
Q. Did they not do that, and that is the way you came to get hurt? A. Yes, sir.

(Witness Excused.)

62 Thereupon the plaintiff offered in evidence and read to the Court and jury the deposition of B. F. Smith, in words and figures as follows, to-wit:

B. F. Smith, of lawful age, being produced, sworn and examined, on the part of the plaintiff, deposeth and saith:

Direct Examination.

Questions by Mr. Turpin:
Q. State your name, age, residence and occupation?
A. My name is B. F. Smith; my age is thirty-one years; my residence is Kansas City, Kansas; I am a bricklayer by trade.
Q. Were you employed on the Proctor & Gamble plant just outside of Kansas City, Kansas, in October, 1904?
A. Yes, sir.
Q. Were you employed there at the time the plaintiff, Eugene Kreigh, was knocked from the building?
A. Yes, sir.
Q. Did you see the plaintiff when he was injured?
A. Yes, sir.

Q. What happened there?
A. The bucket of the derrick dumped him off.
Q. Knocked the plaintiff from the building? A. Yes, sir.
Q. Where was the plaintiff when the bucket struck him?
A. He was on top of the building, close to the edge.
Q. On what was he standing, the wall of the building?
A. Yes, sir, he was standing right along there on some planks right by the wall, I think. I am not sure. He was standing close to the edge, but I dont know exactly what he standing on.
Q. Where were you at the time?
A. I was working on the north wall.
Q. Of the same building? A. Yes, sir.
Q. Where was the derrick situated?
A. Well, it was east of me, down, I suppose, fifteen
63 or twenty feet, maybe more. I dont know exactly how far it was.
Q. How high was the building at that time? A. Well, it was around thirty-five feet, I suppose. That scaffold brought us up to the iron work we were working on then.
Q. What iron work was there at the top of the building?
A. It was the roof of the coal chute, I guess.
Q. The iron beams for the roof of the coal chute?
A. I think that it was, yes sir.
Q. Where was the derrick situated with reference to the iron beams
A. It was setting back about ten or fifteen feet.
Q. On top of the beams?
A. Yes sir, on top of the beams.
Q. What was that being used for?
A. They were hoisting concrete.
Q. What means did they use for hoisting the concrete?
A. They used the derrick
Q. And what else? Did they raise it by means of a bucket?
A. Yes sir, they had a bucket.
Q. Did you see the bucket when it struck Kreigh?
A. Yes sir.
Q. Where was it coming from? A. It was coming from up on the building where they dumped the concrete.
Q. A load of concrete had been dumped and they were sending the bucket out over the building? A. Yes sir.
Q. Do you know how that bucket was propelled out there?
A. Yes sir.
Q. How was it? A. They just give it a push and pushed it out over the building.
Q. Was plaintiff Kreigh in such a position that those operating the derrick could have seen him, or could they have seen him?

By Mr. Hogsett:

The question is objected to, for the reason that the witness has not shown that he knew where the men were who pushed the bucket, nor where Kreigh was, and for the further reason that it was leading and suggests to the witness what counsel wants him to say.

64 Q. State whether or not the men operating the derrick were in such a position that they could see Kreigh when they pushed the bucket? A. Yes sir, they could.

Q. What happened when the bucket struck him?

A. It knocked him off the building.

Q. Where did he go from there?

A. Down to the ground.

Q. Had you ever seen this derrick before it struck Kreigh?

A. Yes sir, I had seen it going up and down there.

Q. Had you seen it on the day prior to the injury to Kreigh? A. Yes sir.

Q. Just state the circumstances how you happened to see it? A. I just came across upon top, going across there at noon time, and I come up to it and pushed it around. That is the first time I knew anything about how it worked.

Q. Were you up there in the performance of any duty?

A. No sir. I just went up there at noon time, going around over the building.

Q. What kind of a derrick was that?

A. A stiff leg derrick.

Q. Do you know whether there was an arm or lever on that derrick? A. There wasnt any on it. There was a rope attached to it.

Q. How many ropes? A. Just one.

Q. Did you see that derrick after the injury?

A. Yes sir.

Q. Did you work with it after the injury?

A. Yes sir, we used it afterward.

Q. Was there any change made in the derrick or its operation between the time of the injury and the time you worked with it? A. No sir.

Q. How was that derrick operated. A. They had a rope attached to the boom, at the end of the boom, and they would push it out and pull it in with the rope.

Q. How did they push it out? A. They just give it a swing and pushed it out. There was a floor where the

65 derrick was at and there was a space that was not floored out at the edge, and they had to give it swing enough to throw it over that space, so it would go out over the wall.

Q. Prior to the time Kreigh was knocked off of the wall by that bucket, had the bricklayer's gang used that bucket?

A. No, sir.
Q. For what was it used prior to that time?
A. Hauling up concrete.
Q. Prior to the time you went up there one day at noon just looking around, do you know how that derrick was operated?
A. No, sir, I never paid any attention to it.

By Mr. Hogsett:
Q. Did you go up there before or after the accident?
A. Before.
Q. The day of the accident? A. The day before it.

By Mr. Turpin:
Q. Who was operating the derrick on the day Kreigh was injured?
A. Well, they had a gang of laborers up there. I don't know who they was. I didn't pay any attention to them.
Q. Do you know what kind of work they were doing?
A. Yes, sir. They were concreting. I don't know any of their names or anything like that.
Q. Did you see Kreigh after he fell? A. Yes, sir.
Q. Did you go down there where he was? A. Yes, sir.
Q. What condition did you find him in when you went down there?
A. I found him pretty well stove up.

By Mr. Hogsett: It is admitted that Kreigh was seriously injured.

Cross-Examination.

By Mr. Hogsett:
Q. You were familiar with the way they pushed and pulled that bucket, were you not? A. Yes, sir.
Q. And it was customary to give the men a warning there, wasn't it?
A. That is the way I always seen them do.
Q. They always gave a warning before that?
66 A. They always signalled him.
Q. They gave a warning to whom—the engineer or Mr. Kreigh? Or who was it?
A. Mr. Kreigh didn't have anything to do with it.
Q. Who would they give the warning to. You said you heard them give a signal. Who was it to?
A. I didn't understand you. You asked me if it was customary to always give a signal?
Q. Yes, sir.
A. Yes, sir; but they didn't that time. I didn't mean it was customary on that work, for they had no signal that I know of, only to just hollow. They had no whistle.

Q. You mean they had no whistle?
A. They had no signal.
Q. They hollowed, didn't they?
A. Of course, they had to do it some way.
Q. Then they did hollow, didn't they. A. Yes, sir.
Q. Then they gave a signal, didn't they?
A. I don't call that no signal.
Q. That is a difference in your opinion. You don't call hollowing a signal?
A. No, sir. Everybody was hollowing there. He didn't know who was hollowing.
Q. I didn't ask you that.

By Mr. Hogsett: I move to strike out the answer of the witness, for the reason that it is not responsive to the question.

Q. You don't consider that hollowing was giving a signal, do you?
A. I would not consider it a signal, no sir.
Q. Who would they hollow to?
A. I suppose the engineer.
Q. Who would do the hollowing?
A. I don't know; any one of the men.
Q. Any of the concrete gang? A. Yes, sir.
Q. Would hollow to the engineer? A. Yes, sir.
Q. What did they usually say?
A. I don't remember; anything.
Q. "Take it away," or "take it off," or "all right," or "look out below?" A. Something like that.
67 Q. Any call indicating that they were ready to take the bucket away? A. Yes, sir.
Q. And they didn't do it this time?
A. I don't know whether they did or not.
Q. You don't know whether they gave a warning at that time or not? A. No, sir.
Q. But prior to that, at all times, you noticed that they had a signal, "look out," or "get out of the way below?"
A. Yes, sir. They made some kind of a noise. They had to do it.
Q. All the time before this accident that you noticed?
A. Yes, sir.
Q. And you couldn't say whether they did this time or not?
A. No, sir.
Q. Do you know whether Mr. Clem was up there at that time or not? A. If he was, I didn't see him.
Q. You wouldn't say that he was? You wouldn't swear here, on your oath, that he was, would you?
A. No, sir, I wouldn't swear that he was or was not. I didn't see him.

Q. Now, how do you know these concrete workmen could see Kreigh?

A. Because there was a level floor, the same as here.

Q. The bucket was between them, wasn't it?

A. Yes, sir. They could see easily right around the bucket. There was three or four of them there.

Q. They could if they had looked? A. Yes, sir.

Q. What you mean to say is if they had looked round that bucket there would have been no trouble in seeing him.

A. They could have looked right over the top of it. It never was raised only just a little above the floor. A boy that high (indicating) could see over the top of it.

Q. Did you notice at that time how high it was?

A. No, sir. They never raised it high. They didn't have to.

68 Q. You didn't notice how high it was this time?

A. No, sir.

Q. It might have been three feet, for all you know?

A. Yes, sir. It never was. I never seen it.

Q. I say this time. You don't know how high they raised it this time, do you?

A. It wasn't raised very high, I know, for I [seen it him.] I am positive it wasn't three feet.

Q. You said you didn't know but what it might have been?

A. Yes, sir.

Q. Which do you mean?

A. It wasn't raised three feet, I know that.

Q. A minute ago you said it might have been. Which did you mean?. I want to get at what you mean. You remember making a statement to the effect that you didn't know whether it was raised three feet or not, and now you say it wasn't raised three feet. Which do you mean?

A. I mean it wasn't raised three feet.

Q. Why did you say you didn't know whether it was or not? Why did you make that statement?

A. I don't know why I said it.

Q. You don't know why you said it? And now you say it wasn't raised three feet?

A. Yes, sir, because when I studied it over I remembered it.

Q. How high was that bucket?

A. I don't know; I suppose two feet and a half or three feet.

Q. How high was that bucket this time raised from the floor?

A. I don't know exactly; a foot or such a matter; maybe more.

Q. Maybe as many as two and a half feet? A. No, sir.

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Q. Did you take any notice of that bucket, how high it was from the roof?

A. I seen it swing out, like I always did, certainly.

Q. Did you take any particular notice of it this time?

A. I noticed it the same as always do.

Q. Did you stop working every time that bucket would swing out, to notice how high it was from the floor?

A. No, sir, I was working facing the bucket.

Q. Every time did you stop to notice that?

69 A. No, sir.

Q. How did you happen to this time?

A. I just noticed the height they always swing out.

Q. What you say is governed by the height they always swing it?

A. No, sir, I seen it swing out that time. They always swing it about the same. It wouldnt be six inches difference.

Q. Why did you say it wasnt swung three feet? Because they never did swing it over three feet?

A. I seen it. They never did swing it that way, either.

Q. Does the fact that they never did have anything to do with your answer? A. No, sir.

Q. You are not governed, in making your answer, by the fact that they never did swing it over three feet?

A. No, sir.

Q. You were governed that time by what you saw?

A. Yes, sir.

Q. The time just prior to that, how high was that bucket?

A. I might not have been looking that time.

Q. How high was it the second time before that?

A. Just about the same; just about like that.

Q. How do you know? A. Because I looked at it.

Q. You looked at it the second time, but you didnt the first time before. Is that what you mean?

A. I don't know what you mean. Some times I looked at it and some times I didnt.

Q. Then you dont know how high it was the second time before it hit Kreigh? A. No, sir; I might not.

Q. You said just a minute ago it was about the same height?

A. It always was. Maybe I would see it once or twice and maybe I would not look at it again.

Q. The second time before it struck Mr. Kreigh it was about the height it always was, a foot and a half or something like that?

A. The time I looked at it. I dont know just which time it was. It might have been the second or third.

Q. Why didnt you take notice of it the time it

70 swung out over the roof last before it hit Mr. Kreigh?

A. I was laying brick.

Q. How did you happen to be not laying brick at the time it hit Mr. Kreigh? A. I happened to be looking that way.

Q. You dont know whether you did the time just before or not? A. No, sir.

Q. Or the second time?

A. I was looking that way pretty near all the time, for I was facing that way.

Q. You said you were looking up?

A. Our heads was almost level with that; just like this. (Indicating.)

Q. Do you lay brick with your face looking out absolutely horizontal, or do you look at your work?

A. Yes, sir, when a wall is up like that I can look straight at you and work. We were standing a little under the iron. I had to stop a little to work.

Q. You were a little under the iron? A. Yes, sir.

Q. The irons were a little above your head? A. Yes, sir.

Q. The irons that formed the roof; you were under those?

A. What?

Q. What irons do you speak of?

A. Those little irons we were working under; the columns; the beams that went across at the ends.

Q. Did these irons you were working a little below form a part of the roof? A. Form a part of the roof?

Q. Yes, sir. A. They were columns setting up like this.

Q. Was any of them running level?

A. Yes, sir a few of them run that way.

Q. Level with the ground?

A. No, sir, level with the roof.

Q. Dont you understand my question? Were the irons that were over your head a little bit, in the roof? Did they form part of the roof of the building?

A. Yes, sir, some of them did. These I was working next was straight up and down.

Q. The ones that were a little over your head is what I want. A. I dont understand what you mean.

71 Q. A minute ago you said some of the irons were a little bit over your head? A. Yes, sir.

Q. Now, I ask you if these irons you had to stoop down to get under formed a part of the roof? A. Yes, sir.

Q. Then your head, and therefore your eyes, were under the level of the roof? Isnt that so?

A. Yes, sir. Them irons was only about like this—about this high. (Indicating.)

Q. And you were under those? A. Yes, sir.

Q. That is, under the roof? A. There was no roof on.

Q. Under what was to be the roof?

A. Yes, sir, when it was covered over.

Q. You were under that roof; under what would later be the roof? A. Yes, sir.

Q. Will you explain to me how you saw this accident?

A. Yes, sir.

Q. All right, if you please, if you were under the roof and it happened on the roof?

A. Supposing there was a beam coming across here and into here, and you are there, and you are Kreigh, and I am here. I am away out here fifteen feet or more from you.

Q. That is understood.

A. Yes, sir. And you were up on top there, cant I see right through between those beams, like this?

Q. Yes, sir. You were looking at Kreigh then?

A. Yes, sir. I was working, and could see right up through there.

Q. You were looking at Kreigh at the time the accident happened?

A. I was looking up that way. I didnt know it was Kreigh that was hit.

Q. Were you looking at the person that later developed to Kreigh?

A. Yes, sir. I seen the box hit the man, and I said to the man next to me, "Who was that?"

Q. How far were the concrete mixers, or what you thought were them, from Mr. Kreigh, or the man who was hit?

A. They was back on the roof.

Q. How did you see them, if you were looking at
72 Mr. Kreigh? A. How could I see them.

Q. Yes, sir.

A. Couldnt I see them when the came out there with the box?

Q. There was no flooring, was there, where they were, out at the edge of the roof? A. No, sir.

Q. How could you see them?

A. I could look right out this way and see them.

Q. They were some ways back from the edge?

A. Yes, sir.

Q. How could you see them?

A. Right through there. Anybody could.

Q. Were you looking two different ways at once.

A. Yes, sir. I can look at you and see him over here at the same time, just in a glance.

Q. Did you glance at that time?

A. I dont know whether I did or not. I know I seen him.

Q. You dont know whether you saw them or not?

A. Yes, sir.

Q. You dont know whether you saw the concrete workmen or not? A. Yes, sir.

Q. Looking at Mr. Kreigh?

A. Looking up this way. I could see a half dozen men. I can see all of you at once here.

Q. Is this your proposition: You were looking at Mr. Kreigh between several of these iron beams nine inches high, or about that, which would later form a part of the roof, and you saw him, looking directly at him, and at the same time you saw those concrete mixers, who would be ten or twelve feet, according to the various estimates, away from him. Is that true?

A. I never said I was looking directly at Mr. Kreigh. I said I was looking up that way.

Q. Do you know what you were looking at?

A. I was looking up that way. I dont know who I was looking at. I looked up like anybody would.

Q. You dont know who you were looking at? A. No sir, I dont. If I had looked at him I would have known it was him.

73

Q. Did you say you dont know what you were looking at? A. No.

Q. You dont know what you were looking at? A. I told you that. I answered it three or four times.

Q. Please answer it now.

By Mr. Turpin: Those questions he asks you over and over again, if you want to, you need not answer those questions.

By Mr. Hogsett: Please put that in the record, Mr. Stenographer.

By Mr. Turpin: All right, put it in the record. I dont care a bit where you put it.

By Mr. Hogsett: Put that in the record too.

Q. You didnt recognize Mr. Kreigh at that time did you? A. No sir.

Q. Did you recognize the concrete dumpers? A. I knew they were men working there.

Q. You didnt recognize them did you? A. I didnt pay any attention to who they was, only just the men working there?

Q. You say that Mr. Kreigh was in plain sight of the men who shoved the bucket? A. I dont see why he wasnt.

Q. Was he? A. Yes sir.

Q. Were not the men who shoved the bucket, and the bucket, in plain sight of Mr. Kreigh, if he had looked at them? A. If he had been looking that way, yes sir.

Q. Did I understand you to say you were on the wall of the building? A. Yes sir.

Q. Working on the wall? A. Yes sir.

Q. Not standing on it? A. No sir.

74 Q. Standing on the scaffold, working on the wall? A. Yes sir.

Q. The derrick was fifteen or twenty feet east of you? A. Something like that.

Q. And about fifteen feet back from the edge? A. Somewhere between ten and fifteen feet.

Q. Did you see the bucket when it started from the men you supposed to be the concrete dumpers; that is, at the time it started? A. I saw them push it and it started off.

Q. Mr. Kreigh was the bricklayer foreman? A. Yes sir.

Q. Working on the same building as the concrete men? A. He was not working.

Q. He was superintending the work on the same building? A. Yes sir.

Q. This boom was at the same height when it came out as when it swung in, wasnt it? A. Yes sir, the boom was always the same.

Q. Did you notice Mr. Kreigh move after the time the bucket swung in and before it swung out? A. I didnt notice him at all. I didnt know he was up there.

Q. You dont know whether he moved or not, prior to the time the bucket struck him? A. No sir, I didnt know he was up there.

Q. Was Mr. Parker your foreman? A. Yes sir.

Q. Where was Mr. Parker at the time of this accident, do you know? A. No sir, I dont know exactly where he was.

Q. You dont know whether he was at the scaffold or not? A. No sir.

Q. Is Mr. Parker a taller man than you are? A. Yes sir.

Q. And is Mr. Albert Riley a taller man than you are? A. Yes sir.

Q. Was Albert Riley working on the scaffold? A. Yes sir.

Q. Do you know where he was working? A. No sir.

Q. Which end of it, east or west of you, at that time? A. I dont remember as to that; somewhere near me.

Q. You dont know whether it was east or west? A. No sir. There was one or two men between him and me.

Q. To your left or to your right, was he? A. I
75 dont remember as to that.

Q. Mr. Kreigh was standing right on the edge of the roof, wasnt he? A. Right close to the edge somewhere.

Q. Within a foot or two, would you say? A. Yes sir, I suppose so. I dont know exactly as to that. It was right close though.

Q. How near were these beams, that formed a part of the roof, together? A. They was different. Some was wider apart than others.

Q. Two feet? A. Yes sir, more than that.

Q. Three or four feet? A. Somewhere along there. I dont know as to that exactly.

Q. Three or four feet? A. Yes sir.

Re-Direct Examination

By Mr. Turpin:

Q. You said something in your cross-examination about somobody calling to some one about this derrick. Were there any other people calling and yelling about that building at any time?

By Mr. Hogsett: The question is objected to for the reason that it suggests to the witness what counsel wants him to say, and is improper on re-direct examination.

A. They was hollowing all the time; the laborers and all. They was hollowing all the time. There was a brick pile right close there, and they was going in and out there and somebody was hollowing all the time.

Q. Did the brick men have a hollow? A. Not for the derrick.

76 Q. Did they ever hollow in their work? A. Yes sir.

By Hogsett: The question is objected to, for the same reason given last above, and motion is here made to strike out the answer of the witness.

Re-Cross Examination

By Mr. Hogsett:

Q. What did they hollow for? A. Like anybody else.

Q. Just talking to each other? A. No sir. They would hollow if they would let the thing down in the way.

Q. Let what thing down? A. The box for the derrick. They had a brick pile right along there where it lowered down to.

Q. About fifteen feet back from the edge of the roof? A. No sir, right close to the edge of the wall?

Q. Would they let the box down at that point? A. Yes sir right over the brick pile.

Q. I thought they would pull it up to this place where they dumped the concrete? A. That is when they let it out to let it down on the ground.

Q. That was after the box had been started down that they would yell for that purpose? A. Yes sir.

Q. And why would they yell? A. It was after it was down there, they would call up there to take it out of the way.

Q. When it was clear down to the ground? A. Yes sir.

Q. But that call the concrete men gave was to the engineer, who was forty-two or three feet below? A. Yes sir.

It is stipulated and agreed by and between the parties, the plaintiff and the defendant, Westinghouse, Church, Kerr & Company that the signature to the deposition of B. F. Smith may be waived, and the same read as if duly signed by the deponent.

(Signature waived.)

Eugene C. Kreich, the plaintiff, recalled as a witness
77 in his own behalf, testified further as follows:

Direct-Examination.

Questions by Mr. Morris.

Q. I understood you, in answer to a question a while ago, to say that if the men pushing the bucket had warned you, you could have got out of the way? A. Yes sir.

Q. That was right, was it? A. Yes sir.

Q. Did you know, Mr. Kreigh, at that time or at any time that there was not a lever upon the derrick in order to control it, stop it or start it? A. No sir.

Q. Did you know at that time that there were not ropes upon the derrick in order to stop or start the boom?

A. No sir.

Q. Do you know whether or not, if there had been ropes to stop the boom or if there had been a lever to stop the boom, it could have been stopped and you would not have been injured, though no warning had been given you?

Mr. Histed: The defendant objects to that question because it is purely speculative.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

(Witness excused.)

D. A. Riley, called as a witness on behalf of the
78 plaintiff, was first duly sworn, and testified as follows.

Direct-Examination.

Questions by Mr. Turpin.

Q. Where do you live? A. Kansas City, Kansas.

Q. What is your occupation? A. Bricklayer.

Q. Where were you employed in October, 1904?

A. Proctor & Gamble soap plant in Armourdale.

Q. Were you employed in the brick gang, as it is called, under Mr. Kreigh's superintendence? A. Yes sir.

Q. Do you remember the time Mr. Kreigh was hurt?

A. Yes sir.

Q. Did you see him knocked off the building? A. I didnt see the bucket hit him, but I saw him falling.

Q. Prior to that time where had the brick men been working on this building? A. Down below, working on the walls.
Q. There was a derrick on top of the steel beams?
A. Yes sir.
Q. And the brick men worked down below that at all times prior to this accident? A. Yes sir.
Q. Do you know B. F. Smith, whose deposition has been read here? A. Yes sir.
Q. Was he one of the same brick gang that you were in?
A. Yes sir.
Q. State whether or not you and he worked near the derrick on top of the building after Kreigh was hurt?
A. We did, yes sir.
Q. Had the brick gang or the bricklayers or the laborers any connection with the concrete gang in using this derrick prior to the time Mr. Kreigh was hurt? A. No sir.
Q, Did they use it afterwards? A. Yes sir.
Q. You and Mr. Smith worked together then?
A. Yes sir.
Q. What kind of derrick was this? A. Stiff leg derrick.
Q. What is a stiff leg derrick? A. There are two
79 beams or legs that run on the floor in a acute angle, and where they meet at the end there is a mast standing up. From the top of the mast there are two boards running out to the floor, with a boom attached on the side that works or swings around.
Q, This derrick had not been moved from the time Kreigh was hurt until you worked there? A. No sir.
Q. Where was it situated? A. At the northeast corner of the building, probably just about twelve feet south of the north wall and an equal distance west of the east wall.
Q. What was it situated on? A. It was resting on top of the steel beams that were to form the roof of the coal bunkers.
Q. Was there any kind of flooring there? A. There was some boards lying on top of the steel beams, back from the wall probably twelve feet.
Q. What was between those boards and the north wall?
A. There was an open space.
Q. Where did the arm or boom of this derrick swing?
A. It swung from—Well, it could swing from the east around to the west, swing north, or back the other way.
Q. How was it used there to bring up the material? First, where did the material come from? A. From the ground.
Q. How did it get on to the top? A. They hoisted it up in a bucket or square box.
Q. What power did they use? A. Steam power from a steam engine.

Q. Where was the engine? A. Situated north of the building, out on the ground.

Q. The bucket was hoisted by means of a rope?

A. Yes sir.

Q. When it was swung up to the top of the building, then what was done? A. There was a tag line attached to the end of the boom, and some one on the building would pull the rope and the boom would swing around on the building.

80 Q. How was the bucket dumped? A. The bottom of the box was hung on hinges and fastened with a clasp and pin. They would remove the pin and the bottom would fall down and the material would drop out of the box.

Q. How did they get the box out over the wall again for a new load? A. They just pushed it around by force.

Q. In what way? A. A man would push on the box and give it momentum that would carry it out over the wall.

Q. And over the open space that you mentioned before?

A. Yes sir.

Q. How many ropes were attached to that? A. One rope.

Q. One end of the rope was at the bottom: where was the other end? A. Lying back on the floor.

Q. What was that rope used for? A. That was used to pull the boom around on the building, to pull the box in.

Q. Was there any rope on the other side of the boom to pull the boom out? A. No sir.

Q. Was there any arm or lever on the mast of that boom with which to operate it? A. No sir.

Q. Was there any way of controlling the boom of that derrick after it was once given a shove? A. No sir.

Q. After they gave that shove, where would it have to go until it stopped? A. It would swing on around until it stopped of its own accord.

Q. Outside of the wall? A. Yes sir.

Q. If anybody got in the way of that boom, was there any way of stopping it after they let go of it? A. No way that I could see.

81 Cross Examination

Questions by Mr. Histed.

Q. There was a rope attached to the boom, a tag line, wasnt there? A. Yes sir.

Q. Where was the other end of the rope? A. Lying back on the floor when I saw it.

Q. That is, it was in reach of the concrete gang of men, wasnt it? A. Yes sir.

Q. Couldnt they move that boom backwards by the rope?

A. What do you mean by moving it backwards?

Q. Stop it? A. If a man had hold of the rope he could stop it.

Q. You said to Mr. Turpin that there was no way, after that boom got started, that it could be stopped. A. Not when a man was pushing on the box.

Q. If the men took hold of that rope they could stop that bucket if it was going over that wall, couldnt they? A. Not in a short distance.

Q. Couldnt they stop that boom by holding on to that rope?

A. Not in time to keep from knocking a man off.

Q. It is not a question of time. Couldnt they stop it?

A. Yes sir.

Q. They could pull it back? A. Yes sir, they could pull it back.

Q. If they put sufficient force on it, they could stop it in a very short space, could they not? A. If there was two or three men ahold of it they could.

Q. There was nothing but the empty bucket going back, was there? A. That is all.

Q. That is the only weight? A. Yes sir.

(Witness excused.)

82 Thereupon, the hour of twelve o'clock noon having arrived, the Court, after duly admonishing the jury according to law, took a recess until two o'clock p. m.; at which hour the Court, the members of the jury, and the parties appeared as before, and the trial of this case was resumed, as follows:

James Cuthbert, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Morris:

Q. What is your name? A. James Cuthbert.

Q. Your age? A. About fifty-seven.

Q. You live here in Topeka? A. Yes sir.

Q. How long have you lived here? A. About twenty-seven years.

Q. What is your business? A. Contractor.

Q. Are you alone or have you a firm? A. I have a partner; the firm is Cuthbert & Sargent.

Q. How long have you and Mr. Sargent been together as partners? A. Twenty-one years.

Q. Among others, what buildings here have you constructed in Topeka? A. This present building here, the building we are occupying now.

Q. That is, the Federal Building? A. Yes sir, the Federal Building. We had two or three different contracts in the

state house; the Douglas County court house last year, the Mitchell County court house; the old post office in Kansas City at the corner of 9th and Walnut.

Q. In Kansas City, Missouri? A. Yes sir, and quite
83 a number of buildings around the state.

Q. Did you, in any of these contracts, have direct supervision of the construction of the buildings? A. Yes sir.

Q. Are you a practical builder? A. Yes sir, I should say so.

Q. Have you, as such builder, had experience in using derricks for raising and lowering material on buildings?

A. Yes sir.

Q. Did you hear detailed this morning the manner in which the derrick upon the Proctor-Gamble building, about which this controversy has arisen, was constructed and operated?

A. I did

Q. In your experience as a contractor as you have detailed, kindly state whether or not the construction and operation of that derrick, as detailed this morning, was a reasonably safe manner to construct or operate it?

Mr. Histed: The defendant objects to this question because it calls for a conclusion of the witness upon a fact in issue, and which, if in issue, is to be passed upon by the jury alone, and because it invades the province of the jury. In this same connection I also wish to make the further objection — as I understand from counsel that they expect to have quite a lot of expert testimony—that any testimony with reference to the manner of construction of this particular derrick, under the admitted facts in this case, is immaterial, because it is at best, granting that the derrick was not properly constructed, but a remote cause; that there was an intervening, efficient cause, without which it would have been impossible for this injury to have occurred, namely, the negligence of the fellow-servants in the manner in which they started the
84 bucket back or the negligence of the plaintiff in failing to pay proper regard to his surroundings in getting in the way of the bucket; that the derrick, admittedly under the proof here, was such a tool or appliance as, with ordinary care on the part of the concrete gang, could have been used without injury to anybody, and that it required the negligent act or the failure on the part of this concrete gang to exercise ordinary care, in the manner in which they sent the bucket over the wall, to produce the injury, and, therefore, that there was an intervening efficient cause or the accident would never have occurred.

The Court: There is a question in my mind whether this testimony is in this case admissible, but I shall sus-

tain the objection to this question. If you desire, however, you may prove by this witness that he knows how such a derrick should be constructed. I think, however, this question attempts to determine the precise matter which might be submitted to this jury. If this witness knows how derricks for such a purpose as this should be constructed, he may state that fact, and he may also state how they should be constructed. The objection to the question is sustained.

To which ruling of the Court the plaintiff at the time duly excepted.

Q. For the purpose for which you heard detailed this morning this derrick was being used, how should a derrick for that purpose and under those circumstances have been constructed and operated in order to be reasonably safe?

Mr. Histed: The defendant objects to the question
85 because it calls for a conclusion of the witness and allows him to invade the province of the jury and decide this issue for them. It is not the proper way to examine an expert witness upon a subject of this character. It is not a question of what this witness thinks, but what is the general practice—if, indeed, they can go into the question at all.

Questions by the Court.

You have heard stated the purpose for which this derrick was constructed and used? A. Yes, sir.

Q. From you experience as a builder, do you know how a derrick for such purpose, on a building of the kind in question, should be constructed? A. I think I do. I have used them.

Q. Do you know how they are commonly constructed and used? A. Yes sir.

Questions by Mr. Morris.

Q. I will withdraw my last question. Mr. Cuthbert, for the purpose for which you heard this morning the witnesses detail the use to which this derrick was put, state how it should have been constructed and operated in order to have been reasonably safe, or what would have been the usual manner or is the usual manner of constructing and operating derricks for that purpose?

Mr. Histed: There are two questions in one.

Mr. Morris: I will withdraw the last part of it.

Mr. Histed: The defendant objects to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury and decide the

86 issue for them. It is not the proper way to examine an expert witness upon a subject of this character. It is not a question of what this witness thinks, but what is the general practice.

The Court: Let this witness state how derricks are usually constructed for such purposes, if he knows.

Q. For the purpose for which you heard detailed this morning this derrick was being used, state how they are usually constructed.

A. This derrick was what was called a stiff leg derrick, I understand. They are guyed with two stiff legs on an angle of probably sixty-five, and they are generally circled at the bottom and what we call head lines, a line on each side of the boom to guide it around, and with good and sufficient blocks and tackle. It is owing to what you are going to hoist with it. If you have a heavy lift, you have to rig your derrick accordingly.

Q. How are they usually constructed for the purpose of moving the boom either in or out?

A. You mean swing the boom around?

Q. Yes sir.

A. Well, it is owing to the state of the weather sometimes. When you are using a large derrick, you have to use a block and tackle, sometimes with a lever. On this building here I used a block and a tackle and guyed the boom around. The usual way on a light derrick like that would be to have two guy ropes on the point of the boom, one on each side, and the duty would be of the men—one man detailed for each of them guy ropes—when you are moving that around, to hold the ropes and steady it.

Q. The purpose of the guy ropes is what?

A. Steady the boom as it goes around.

Q. State whether or not either of those guy ropes are used for the purpose of swinging the [book] in and the other

87 to swing it out?

A. One to swing one way and the other the other way, yes.

Q. State whether or not it is usual or customary, in the operation of such a derrick, to swing the boom out or in by men pushing upon the bucket supported by the rope running over a beam?

A. No, not unless it is on the ground, probably. He might do it on the ground, probably.

Q. Up on a building forty-two feet above the surface, is that usual or customary?

A. No, not in my experience. I wouldn't think that would be usual. I wouldn't think it would be right to do that way.

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Mr. Histed: The defendant moves to strike out the last portion of the witness's answer, "I wouldn't think it would be right to do that way."

The Court: The motion is sustained, and the jury will not consider that portion of the answer.

Q. State, Mr. Cuthbert, whether or not the proper control of the boom could be had by using less than the two guy ropes of which you have spoken?

Mr. Histed: The defendant objects to that as improper and immaterial.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

Cross-Examination.

Questions by Mr. Histed.

Q. How large did you understand this derrick was?
A. I would construct it about twenty-five feet.
Q. How large did you understand this derrick was?
A. About a twenty-foot boom.
Q. Where did you hear that?
88 A. I think I heard it from some of the witnesses here.
Q. You heard it from the attorneys?
A. Some of the witnesses.
Q. Did you hear any witness give the dimensions of this derrick this morning? A. No.
Q. As a matter of fact, no witness did testify to the size of the derrick, did they? A. No.
Q. Where did you get the information on which you have based your testimony about this derrick?
A. I was talking to one of the witnesses.
Q. So you took into consideration in your testimony facts and circumstances that you did not hear from any witness on the stand? You know nothing, as a matter of fact, from any testimony produced here, as to how large this derrick was, do you? A. No, sir.
Q. You know nothing about where that derrick stood on the roof? A. Only what I heard.
Q. From any testimony on the stand, I will ask you to state how far the foot of that derrick stood from the north wall? A. I couldn't tell you.
Q. From any testimony that you heard from any witness on the stand, I will ask you to state what support there would have been to any guy rope on the boom on the north?
A. They generally support———

Q. (Interrupting) I am asking about this particular case.
A. You mean what support they would have for a guy rope?
Q. You say there must have been a guy rope to the nort' on this boom as I understand you?
A. No, I don't think I did.
Q. You said there must be two ropes, one on each side of that boom?
A. Yes, in general use.
Q. What do you call those ropes? A. Guy ropes.
89 Q. I am asking you, from any testimony you heard here about the way that derrick set on those beams up there, where that guy rope could have been fastened?

Mr. Morris: The plaintiff objects to the question as incompetent, irrelevant, immaterial, and not proper cross-examination.

The Court overruled the objection; to which ruling of the Court the plaintiff at the time duly excepted.

A. Down to the ground.
Q. Clear down on the ground below? A. Generally, yes.
Q. Then that would have been a stiff line, a topline?
A. Yes.
Q. How would that permit the boom to move if you had the line taut?
A. You could have a line with a man at the end of it.
Q. Have a man clear down on the ground forty feet away?
A. Yes, sir, generally do that way.
Q. Do you know anything about the surrounding ground down there with reference to that?
A. I don't know a thing about it.
Q. Would that man be of any assistance at all in moving the load from the wall back on to the roof where they wanted to unload the bucket? A. No, I wouldn't think so.
Q. None at all? A. No.
Q. You wouldn't need his line, would you?
A. The general practice is ————
Q. (Interrupting) That is not the question. They would not need his line, would they?
A. It would be owing to the weather. If the wind was blowing, you would generally have both lines.
Q. So far as pulling the boom around to the left or to the south, of course that line would not do any of that work, would it?
A. It would steady the derrick, of course.
Q. What would be the line that would pull it south?
90 A. The south line, of course.
Q. The south line on the boom? A. Yes, sir.

Q. When that load would be dumped on to the concrete roof, of course the return of the bucket over the wall would be a comparatively small performance, would it? A. It is owing to how your derrick was fixed. If she swung easy—

Q. (Interrupting) Do you know anything about this derrick? A. No, I do not.

Q. You do not know whether it would have been an easy thing or not, do you? A. No, I dont know.

Q. For all you know, was there anything that would have prevented the steadying of this boom and this empty tub, as it went back to the wall, with the rope that was attached to the boom to the south?

A. You could only steady one way with one guy rope.

Q. As that empty bucket was being returned back off of the roof and down the wall, they would use the rope that was attached on the top of the building and attached to the south side of the boom, wouldnt they?

A. You could only use it for one purpose.

Q. Let us see if you and I understand each other. We will suppose this (indicating) is north here towards me, and this is south and this is the boom, and we are on top as this roof, with a guy line down here within handy reach of the concrete men—You understand that line was within easy reach of those men? A. Yes.

Q. As they start this boom around there they could be holding to that guy line, controlling the speed at which they were going, and also could stop it, couldnt they?

Mr. Morris: The plaintiff objects to the question as not proper cross-examination.

The Court overruled the objection; to which ruling of the Court the plaintiff at the time duly excepted.

A. I understand there was a space of twelve feet there where there was no covering.

91 Q. Where did you get that information?

A. From the testimony this morning.

Q. What witness testified to it, do you remember?

A. I dont know.

Q. You dont know anything about how long this guy rope was, do you? A. No sir.

Q. If those concrete men were holding this guy line over there, and the line was sufficiently long, there is nothing that would interfere with the suggestion I make of their being able to steady that boom and load by means of that line as it went back over the wall, is there? A. As I said before, it is owing to if there was any wind blowing. They could steady it one way, but not the other.

The Court: They could steady it with that load going north, couldnt they?

A. They could only steady it one way.

Q. If this boom was going north and those men were over to the south, with the south rope— A. (Interrupting) They could steady it to a certain extent.

Q. Your guy rope on the north will not be used in stopping that load at any given point as it was going north—the empty box? A. The—

Q. (Interrupting) Answer my question.

A. No. The south line would be—

Q. (Interrupting(Let me ask you this question: Is it not a matter of judgment by you men on the ground with reference to the way in which you build and operate your derricks?

Mr. Morris: The plaintiff objects to the question as incompetent, irrelevant, immaterial, and not proper cross-examination.

The Court overruled the objection; to which ruling of the Court the plaintiff at the time duly excepted.

92 A. A matter of judgment.

Q. Yes sir. A. Yes, a good deal.

Q. Dont the contractor on the ground or his men have to adapt themselves to circumstances? A. Yes.

Q. And those circumstances of course differ very largely in various classes of work, dont they? A. Yes sir.

Q. And then it comes down to the question that the man on the job, who builds and operates his derrick, after all must exercise a large degree of judgment in the way in which he shall put up and operate it? Isnt that true?

A. That is true to a certain extent.

Redirect-Examination.

Question by Mr. Morris.

Q. What do you mean by the last portion of your answer, "to a certain extent?" A. He will exercise his own judgment. Very often he gets his own judgment as well as that of somebody else.

Q. Sometimes they use judgment and sometimes they dont —is that what you mean? A. Yes sir.

Q. Is it usual to use a derrick on a building such as described by the witness Mr. Riley, who was on the stand just before noon, with no other means of controlling it than one line? A. No, it is not.

Q. Why is it not usual? A. Because you cannot control, in my judgment, a derrick with one line, because the wind on a derrick of any size will have an effect on it, especially when

you get up forty or fifty feet in the air, and you generally have to put two ropes on it so you can guide it.

Q. If a derrick like that were shoved out by hand, as described this morning by the witnesses, could it be con-
93 trolled in stopping by the use of one line?

A. It could be controlled to a certain degree, but you could not control it as it ought to be, I dont think.

Q. Is it usual, in the construction or operation of such derricks, to have a code of signals by which the parties upon the building are notified when the boom is started either way or the bucket raised or lowered?

A. In the construction of this building here—

The Court: (interrupting) That is not the question.

Q. Is it usual? A. It is usual, yes.

Recross-Examination.

Questions by Mr. Histed.

Q. What do you mean by code of signals? Any written words? A. No, oh, no.

Q. Is there any well defined phraseology that contractors employ around over the country? A. The signals are a good deal like the train men have---signals with the hand or with a whistle or bell.

Q. You mean signals to the engineer down below?

A. And to the men down below and to the men above. Some man in charge of the derrick gives the signals.

Q. Those are signals to the engineer as a rule and to the men that are operating the derrick?

A. The men that are pulling the derrick one way or the other.

Q. Signals to hoist or to let go or to turn the engine slack, or something of that kind? A. There are signals for that, and signals to the men at the guys to pull around.

Q. Just a halloo of some kind?

A. Sometimes a whistle; sometimes if you are within speaking distance they yell; if you are not, you signal with the hand---give railroad signals.

(Witness Excused.)

The plaintiff then offered in evidence the deposition
94 of Angus M. Turner, taken on behalf of plaintiff in November 29th, 1905, which said deposition was read to the Court and jury and is in words and figures as follows, to-wit:

"Angus M. Turner, being first duly sworn, on his oath "testified as follows.

Direct-Examination:

"By Mr. Turpin.

"Q. You may state your name, age, residence and occupatian. A. Angus M. Turner, 34 years old, 37th and Roanoke Boulevard, Kansas City, Missouri; stone contractor.

Q. Of what firm are you a member? A. Turner Bros. 303 Junction Building.

Q. How long have you been in the stone contracting business? A. About fifteen years.

Q. How extensively has been your busines in Kansas City? A. Well, we have done a great deal of work here, about the largest in the town in our line.

Q. Have you worked on any of the large buildings in Kansas City? A. Yes.

Q. Can you name some of them? A. We built the Christian Science Church, The Second Presbyterian Church, Swofford Bros. foundation up here, Burnham, Hanna and Munger, Armour's work, Armour Memorial, all the work at the packing house in the last three years. L. B. Price's house at 41st and Warwick.

Q. State what you are working at now? A. We have the Metropolitan work and the Santa Fe work in the bottoms.

Q. In the work you have done have you used a derrick extensively? A. Yes, we have used a great many derricks. We own a good many too. We have pretty large quarries, you know, and we have a good many derricks to use.

Q. Are you familiar with the operation and construction of derricks? A. Yes.

Q. Do you know how a derrick ought to be constructed?

95 A. Yes.

Q. What is a stiff leg derrick? A. A stiff leg derrick, that is a derrick that is generally used, you can put a stiff leg up in less space because the main support is by timber legs. Such as is used on a building where you can put guides up. You can only fasten it down, you can only get 3/4 inch swing with stiff leg derricks unless you build a very large one.

Q. If what is known as a stiff leg derrick is placed at the top of a building, for the purpose of raising material for work on the building, and the material is hoisted in a bucket or tub attached to a hoisting rope running through the derrick and attached to the engine which furnished the power for hoisting the bucket, and the derrick swings out over the outside of the wall of the building, and the tub is then raised by the engine, and is then swung around so that the bucket may be dumped on a convenient place on the building, what is the usual methof moving, swinging, controlling the boom of such a derrick so as to swing the boom of the derrick and the bucket into

place the material, and out to place the bucket on the outside of the wall.

Counsel for defendant objects to the above question for the reason that the witness has not shown himself competent to give expert testimony on a question of that kind, and for the further reason that there is no allegation in the petition of the plaintiff which alleges that the defendant Westinghouse Church, Kerr & Company did not abide by the usual method of doing the work indicated in the question."

Mr. Histed: We will withdraw that objection at this time.

(Note by Reporter: Objections, rulings and statements at the trial are indented, while those at the time of taking of the depositions are not.)

"A. Well, I can tell you what we use on the same kind of a thing. Call at the Armour Packing Company and they'll tell you the same thing.

Q. Go ahead and tell what you used."

Mr. Histed: We object to that.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time excepted.

"Q. Is that the usual and customary way of operating such a derrick?"

Mr. Histed: We object to that also.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. If a derrick with a boom attached to the mast so that the mast and boom will turn so that the end of the boom would describe a part of a circle were placed on top of a building about forty feet from the ground and such derrick is used for the purpose of raising material for construction to the top of a building by a rope attached to an engine on the ground which engine furnished the power for raising the material and the material was drawn up on the outside of the wall of the building in such bucket or tub, such hoisting rope being run through a pulley at the boom of the derrick and when such bucket or tub was raised to the top of the building the boom was hauled in by a rope used for that purpose, and the bucket was lowered or dumped at the place where it would be hauled in and then pushed out by one or more workmen so that the bucket and the boom of the derrick would swing from the outside of the wall by a shove, and the place where the material was dumped was a platform or floored space; between

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this platform or floored space the wall of the building over which the bucket swings was an open space with no floor
97 and there was no lever or bar attached to the derrick by which it could be stopped, started, moved or controller, in your opinion was that an ordinarily careful and prudent way of operating a derrick as has been described?

Dft's Counsel: Objected to for the reason that the witness has not qualified himself as an expert to testify on these matters and give his opinion on them and for the further reason that the question asks for the legal conclusion of the witness the question of whether that was ordinarily prudent and careful way to operate the derrick and tub is a question for th jury to determine, and for the further reason that the witnes has not testified that he knows what the ordinary method c doing this work is, but only to the fact that his firm does the work in a certain way."

Mr. Histed: I also desire at this time to object to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon the subject of this character; and because it is not a matter upon which the witness should be allowed to express an opinion.

The Court sustained objection; to which ruling of the Court the plaintiff at the time excepted.

"Q. Does this bucket go down along side the wall?
A. Yes. Well, now, it was not practical or prudent either for to have an arrangement of that kind, the bucket would slide right along the wall all the time unless there was something to hold it up. It was not practical.

Dft's counsel moves to strike out the witness' answer
98 in which he says it was not practicable as that is not what the question calls for."

Mr. Histed: We insist upon that motion at this time, inasmuch as the objection to the question was sustained.

The Court sustained the motion; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. What would you say of a derrick constructed as has been described in regard to the safety of such a derrick?"

Mr. Histed: The defendant objects to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character; and because it is not a matter upon

which the witness should be permitted to express an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. What would you say as to the safety of such an arrangement in regard to workmen?"

Mr. Histed: The defendant objects to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character; and because it is not a matter upon which the witness should be allowed to express an opinion.

99 The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. How should such a derrick be operated in your opinion?"

Mr. Histed: The defendant objects to this question because it is not a matter which justifies calling for an opinion of the witness, but the usual and customary practice among those skilled in this business.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. In your opinion would or would not a derrick so constructed be reasonably safe for other workmen working around such a derrick?"

Mr. Histed: The defendant objects to the question because it calls for a conclusion of the witness.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

The Court: Does he anywhere state what the usual custom is among builders with reference to this matter?

Mr. Turpin: Yes sir, I think on redirect-examination he does.

"Q. If such a derrick as has been described in a previous question should be operated without having some persons stationed at such derrick to operate and direct the operation of such derrick, and if such derrick should be left to the operation of any laborer would you say that was a careful and prudent arrangement of such a derrick?

Dft's Counsel: That is objected to for the reason that there is no allegation in the petition which charges the defendant with negligence in failing to have a man or men present
100 at the time the bucket was swung out over the wall or swung in, and I move, if the answer was given to have it stricken out. Further objected to for the reason that it is inconsistent. It assumes a set of circumstances in which there is no man present to direct the operation of the affair and then attempts to charge the defendant with negligence because it had a laborer there to direct the operation of the derrick."

Mr. Histed: The defendant further objects to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character; and because it is not a matter upon which the witness should be allowed to give an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

Mr. Turpin: We will not offer any more of the direct-examination.

Mr. Histed: We do not care to offer the cross-examination.

Mr. Turpin: We will offer the redirect-examination of this witness, then.

"Redirect-Examination

"By Mr. Turpin.

"Q. Mr. Turner, suppose the derrick should stand from six to ten feet from the wall, how long would the boom have to be? A. You would require four or five feet on the outside of the wall with your boom.

Q. How long would the boom have to be if it was
101 from six to ten feet from the wall? A. If it was ten feet, you would need at least a fifteen foot boom.

Q. If it was six feet, how long? A. About eleven feet; ten or eleven feet.

Q. When you said in your cross-examination that this boom and bucket could not be pushed out by one or two men, did you assume that the derrick was plumb, or not plumb? A. No sir; that was a little bit off plumb. Unless the man kept a tight rope, he couldnt stop it.

Q. Mr. Turner, if a derrick with a boom attached to a mast, so that the mast and boom will turn, so that the end of the boom will describe part of a circle, are placed on top of a building about forty feet from the ground, and such derrick is

used for the purpose of raising material for construction to the top of the building by means of a rope attached to a bucket or tub and run through such derrick and attached to an engine on the ground, which engine furnished the power for raising the machinery, and the material was drawn up on the outside of the wall of the building in such bucket or tub, such hoisting rope being run through a pulley at or near the end of the boom of the derrick, and when such bucket or tub was raised to the top of the building the boom of the derrick was hauled in by a rope used for that purpose, and the bucket was lowered and dumped at the place to which it would be hauled up, and then pushed out by one or more workmen, so the bucket and end of the boom of the derrick were swung out over the outside of the wall by the impetus given it by a shove, and the place where the material was dumped was a platform or floored space, and between that platform or floored space and the wall of the building over which the bucket swung was an open space with no flooring, in your opinion, would or would not that be a proper method of operating such a derrick?

By Mr. Hogsett: That question is objected to, for
102 the reason that practically the same question was asked of this same witness by plaintiff's counsel, beginning at the bottom of page three of this deposition and extending over part of page four, and that the witness answered that question fully and completely; and it is further objected to because the witness has not qualified himself as an expert to testify on these matters and give his opinion as to the proper way to conduct them; and for the further reason that the question asks for a legal conclusion of this witness, the question of whether this was a proper way to operate the derrick being a question for the jury to determine; and for the further reason that the witness has not testified that he knows what the proper way of doing the work would be, but only to the fact that his firm does the work in a certain way.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. Why, in your opinion, would not that be a proper operation? A. Well, in the first place, a shove isnt the proper thing to handle a derrick with. It either ought to be handled by a lever, or a rope at each end of the boom, so it would be always under control. Whichever way it goes the boom ought to be under control.

By Mr. Hogsett: The defendant moves to strike out the last two answers of the witness as not being competent, relevant or material, for the reason that the question to be determined in this case, which would fix negligence on this defendant or

relieve it from negligence, is whether it did or did not comply with the usual and ordinary method of manipulating such a derrick as employed by reasonably prudent and competent men engaged in the same or similar business, and for the further reason that this same witness has already testified in his cross-examination that he has seen derricks of this type and
103 size operated with a lever in only two instances, and is therefore not competent to testify upon what the usual and ordinary method of reasonably competent men is."

Mr. Histed: I desire also to object to the witness arguing the matter. It is not a matter of his opinion, but a question of whether this is the usual and ordinary practice.

The Court sustained the motion to strike out and directed the jury not to consider the answer; to which ruling of the Court the plaintiff at the time duly excepted.

Q. I will change the question. Mr. Turner, you may state whether or not such a derrick as I have just described, in the last question describing a derrick, and operated as described in that question, does or does not comply with the usual and ordinary methods of manipulating such a derrick, as employed by reasonably prudent and competent men engaged in the same or similar business?

By Mr. Hogsett: That question is objected, for the reason that it is not proper for this witness, as a witness, to testify upon the point of who are reasonably prudent and competent men engaged in the same line of business.

A. Now, that is just the same as you explained to me, isnt it? and I answered you awhile ago? Isnt that just the same? I said it wasnt before, the one that was described to me.

Q. Now, Mr. Turner, if a derrick with a boom attached to the mast, so that the mast and boom will turn, so that the end of the boom will describe part of a circle, are placed on top of a building about forty feet from the ground, and such derrick is used for the purpose of raising material for construction to the top of the building by means of a rope attached to a bucket or tub and run through such derrick and attacked to an
104 engine on the ground, which engine furnished the power for raising the material, and the material was drawn up on the outside of the wall of the building in such bucket or tub, such hoisting rope being run through a pulley at or near the end of the boom of the derrick, and when such bucket or tub was raised to the top of the building the boom of the derrick was hauled in by a rope used for that purpose, and the bucket was lowered and dumped at the place to which it would be hauled in, and then pushed out by one or more

workmen, so the bucket and the end of the boom of the derrick were swung out over the outside of the wall by the impetus given it by a shove, and the place where the material was dumped was a platform or floored space, and between that platform or floored space and the wall of the building over which the bucket swung was an open space with no flooring, in your opinion, did that comply with the usual and ordinary method of manipulating such a derrick as employed by reasonably prudent and competent men engaged in the same or similar business.

"By Mr. Hogsett: The question is objected to, for the reason that the whole question, in all its details, has been asked of the witness before and answered by him, over the objections of the defendant, all of which objections are hereby renewed by defendant."

Mr. Histed: This question allows the witness to form his opinion about what reasonably prudent men would do. He determines for himself who are reasonably prudent men. Practically, it is a repetition of the same line of testimony to which your Honor sustained an objection. This is a question of what is the ordinary and accepted usage among men engaged in that business, and
105 that is the only line of testimony that is admissible. It is not for the witness to confine that to any particular ones. He might, for all that appears here, have concluded that two or three men, who are in this business and doing this way, who are in that particular category and all the rest are unreasonable and imprudent men.

Mr. Turpin: When the objection was made, I followed the language suggested by counsel for defendant, and met the objection as it was made.

The Court: Of course, in cases of this character, what others engaged in the same line of business do, while not at all controlling, is evidence of correct usage. The trouble with the question here is that there might be only one or two persons, as suggested by counsel for defendant, that would follow out the ideas of the witness. I will, however, let him answer the question. The objection is overruled.

To which ruling of the Court the defendant at the time duly excepted.

"A. No, sir, that is not the proper way to handle it."

Mr. Histed: The defendant moves to strike out that portion of the answer, "that is not the proper way to handle it."

The Court: The motion is sustained; the answer "no, sir," may stand, but the jury will not consider the other portion of the answer.

Mr. Histed: I desire to read just a portion of the recross examination, as follows:

"Recross Examination

By Mr. Hogsett.

"Q. Your answer to Mr. Turpin's last question was
106 that that was not the proper way to handle a derrick of that kind. Is that true? A. Yes, sir.

Q. But you still maintain that the only two instances in which you have seen a derrick of that type and size, of that approximate size, operated with a lever, or to put it in other words, not operated in the method described by Mr. Turner, are the two times you have heretofore mentioned? You still stick to that statement, do you?

A. You know the derrick you referred to is a larger one than those I saw.

Q. Of that approximate size, I said. Do you still stick to your former statement.

A. Yes, sir; that I believe it is the best way to handle it.

Q. I say do you still stick to your statement heretofore made and sworn to that the only two instances in which you have seen derricks operated by a lever, of the type and size described by Mr. Turpin and myself, are the two heretofore described by you? A. Yes, sir, they are the only two.

Mr. Morris: The plaintiff desires to offer the balance of the re-cross examination on this point and to read it as follows:

"Q. Now, suppose this mast of the derrick was leaning in the direction of the boom, you say that the tub would swing around off the building of its own motion?

A. Yes, sir, whatever way it was.

Q. If it was leaning towards the boom it would swing around of its own motion?

A. Yes, sir; after it gets a start, but you couldnt hold it back.

Q. Would it be absolutely impossible to hold it back?

A. No, sir, if you keep a tight line you could hold it
107 back.

Q. You would have to keep a very tight rope would you, Mr. Turner?

A. If it was leaning the other way it would come towards you, and you couldnt stop it without getting a rope on the other side of it.

Q. If the mast was leaning towards the boom it would swing around of its own motion, wouldnt it?
A. After it got started.
Q. After it got a little bit of a start? A. Yes, sir.
Q. It would take a very little start? A. Yes, sir.
Q. Just a little bit of a shove. A. Yes, sir.
Q. And then it would swing around of its own motion?
A. Yes, sir, after it started, if it was out of plumb.
Q. If the mast was out of plumb in the direction of the boom?
A. The question is, would it swing around itself?
Q. Yes sir. A. It certainly would.
Q. If the mast was absolutely plumb, or reasonably near plumb, it would take a considerable push to start it?
A. Yes, sir.
Q. In fact, so much so that you dont think that two men could shove it off, unless they shoved it clear to the edge of the roof? A. Within a few feet, I said.
Q. If there was a space of ten or twelve feet to the edge of the roof from where they were standing, and the mast was absolutely plumb or reasonably near thereto, they couldnt push it off the edge of the roof?
A. No, sir, not if it was a large derrick like you described.
Q. Suppose the mast was leaning away from the boom, then the boom would swing around the opposite way?
A. Yes, sir.
Q. In the opposite way from the edge of the roof?
A. Yes, sir.
Q. You say the boom would have to have four or five feet clearance of the roof?
A. Yes sir, certainly; otherwise, the projection of the wall would keep it from going down.

"Signature Waived."

Mr. Turpin: The plaintiff now offers in evidence the deposition of W. N. Gedny, of Kansas City, Missouri.

"Direct Examination

By Mr. Turpin.
"Q. State your name, age, residence and occupation?
A. My name is W. N. Gedny; my residence is 3237 McGee; I am general superintendent for the S. J. Hayde Contracting Company.
Q. Have you had any experience in building construction, Mr. Gedny? A. I have.
Q. How long?
A. All my life, ever since I was thirteen years old, and I am now going on thirty-seven.
Q. Have you used derricks during that time? A. Yes sir.

Q. To what extent?
A. I was never on a job without one.
Q. Are you familiar with the operation of derricks?
A. I am.
Q. Are you familiar with the construction of derricks?
A. I am.
Q. What is meant by the term "stiff legged" derrick?
A. It is a derrick that has a main staff, supported by tw stiff legs, two braces, rather, with a boom with a hoisti rope attached to it, and the boom swinging around over building, over the hoisting place.
Q. If what is known as a stiff leg derrick is placed at top of a building for the purpose of raising material for w on the building, and the material is hoisted in a bucket or attached to a rope run through the derrick and attached to a engine, which engine furnished the power for hoisting th bucket, and the derrick swings out over the outside wall o the building and is then raised by the engine, and is the swung around so that the bucket may be dumped at a conve ient place on the building, what is the usual method of swing ing or controlling the swinging of such a derrick so as t swing the boom of the derrick and the bucket in to place th material and out to place the bucket on the outside of th wall?

"By Mr. Hogsett: I object to that, for the reas that the witness has not shown himself practically famili with the operation of such derricks. and therefore, the que tion calls for a conclusion from a witness who has not qualifi himself as an expert on this particular line."

The Court overruled the objection; to which ruling the Court the defendant at the time duly excepted.

"A. The only safe way to control the movements of a stiff leg derrick is to have a main, with a lever attached to main staff of the derrick.

"By Mr. Hogset: I move to strike out the answer of th witness, on the ground that it is not responsive to the questio and for the further [-] that it gives a legal conclusion."

The Court sustained the motion; to which ruling of t Court the plaintiff at the time duly excepted.

"Q. If a derrick with a boom attached to a mast, so th the mast and boom will turn so that the end of the boom wou describe a part of a circle, were placed on top of a buildi about forty feet from the ground, and such derrick is used f the purpose of raising material for construction to the top the building by means of a rope attached to a bucket or t

and run through the derrick and attached to an engine on the ground, which engine furnished the power for raising the material, and the material was drawn up on the outside of the wall of the building in such bucket or tub, such hoisting rope run through a pulley at or near the end of the boom of the derrick, and when such bucket or tub was raised to the top of the building the boom of the derrick was hauled in by a rope for
110 that purpose, and the bucket was lowered and dumped at the place to which it should be hauled and then pushed out by one or more workmen so that the bucket and the end of the boom of the derrick were swung over and outside of the wall by the impetus given it by a shove, and the place where the material was dumped was a platform or floored space and between this platform or floored space and the wall of the building over which the bucket swung was an open space with no flooring, and there was no lever or bar attached to the derrick or to the mast of the derrick by which it could be stopped, started, moved or controlled, would you say, in your opinion, that that was an ordinarily careful and prudent way of operating such a derrick?

"By Mr. Hogset: That question is objected to, for the reason that it assumes a condition and circumstance in this case which is not proven, and for the further reason that it asks for a conclusion of the witness, when he has not shown himself competent to testify on that point. The question is further objected to, for the reason that it assumes that the only way by which this boom could have been stopped was by a bar or lever, thereby precluding the defendant Westinghouse, Church, Kerr & Company from showing that it had, at the time and place of this accident, suitable means for stopping the boom at any given point."

Mr. Histed: I desire to offer the further objection that the question calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character; and because it is not a matter upon which the witness should be allowed to give an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. In your opinion, would a derrick arranged or
111 rigged in the manner as described be safe for [wokrmen] employed on the building?

"By Mr. Hogset: That question is objected to, for the reason that it asks for a legal conclusion. Whether the derrick

just described was safe or not is a question for the jury, and it is not within the province of this witness to answer the question."

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. Why do you consider it not safe, Mr. Gedny?"

Mr. Histed: The defendant objects to that for the reasons heretofore stated, and because it is along the same line of questions as those to which objections have been sustained by your Honor.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. How should that, in your opinion, have been raised?

Mr. Histed: The defendant objects to this question because it calls for a conclusion and opinion of the witness and allows him to invade the province of the jury; because is not a proper way to examine an expeet witness upon a subject of this character; and because it is not a matter upon which the witness should be allowed to give an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. If such a derrick as has just been described in a previous question should be operated without having some person stationed at such derrick to operate and direct the oper-
112 ation of such derrick, but such derrick should be left to the operation of any laborer who came along, would you say that that was careful and prudent management of such a derrick?

"By Mr. Hogset: The question is objected to, for the reason that there is no allegation in the petition charging the defendant, Westinghouse, Church, Kerr and Company, with negligence on account of a failure to provide competent men to operate the derrick, and for all the reasons heretofore given to a similar question."

Mr. Histed: The defendant objects further to the question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character; and because it is not a matter upon which the witness should be allowed to give an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. If such a derrick as has been described in a previous question should be operated in such a building without any arrangement being made for signals notifying those who are operating the derrick and other workmen on the building that the derrick was about to be operated, in your opinion, would that be careful and prudent management of such a derrick?"

Mr. Histed: The defendant objects to this question because it calls for a conclusion of the witness and allows him to invade the province of the jury; because it is not a proper way to examine an expert witness upon a subject of this character: and because it is not a matter
113 upon which the witness should be allowed to give an opinion.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. In these buildings, where you have been engaged in their construction, have you had personal knowledge of the operation of derricks? A. I have."

Mr. Histed: We do not care to offer the cross-examination of this witness in this deposition.

Mr. Turpin: We shall offer the cross-examination of this witness, then, and read it at this time.

Mr. Histed: It is their testimony, then, and I presume we have a right to object to it?

The Court: Certainly.

Mr. Turpin then read the cross-examination in the deposition of the witness W. N. Gedny, as follows:

"Q. You say that there should be a man stationed at the mast, to operate it safely?"

Mr. Histed: That question is objected to because it calls for a conclusion of the witness and is without the rule prescribed by the Court. It is not the proper way of proving the duty that rests upon a contractor.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. Suppose there was no lever, what good would having a man at the mast do?"

114 Mr. Histed: The question is objected to by the defendant because it called for a conclusion of the witness

and is without the rule prescribed by the Court, and is not the proper way of proving any duty that rests upon a contractor.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. Suppose there wasnt one, what good would having a man at the mast do?"

Mr. Histed: The question is objected to by the defendant because it calls for a conclusion of the witness, is without the rule prescribed by the Court, and is not the proper way of proving any duty that rests upon a contractor.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. In your opinion, the only respect in which the derrick described by Mr. Turpin was not properly operated was that it did not have a lever on the staff or mast to control the boom? A. There was no lever and no man both. The lever would do no good without the man.

Q. If there was no lever, there would be no occasion for having a man there? A. No sir.

Q. Then it resolves itself down, in your opinion, to a failure to have a lever on the mast to control the boom?

A. Yes sir.

Q. Did I understand you to say that without a lever it was absolutely impossible to keep the boom from swinging out off of the building?"

Mr. Histed: The defendant objects to this question be-
115 cause it calls for a conclusion of the witness, is without the rule prescribed by the Court, and is not the proper way of proving any duty of a contractor.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. If there was a rope attached to the end or near the end of the boom, that would, as I understand you, prevent the boom from swinging out off of the building? That is, it could be done?

Mr. Histed: The defendant objects to this question because it calls for a conclusion of the witness, is without the rule prescribed by the Court, and is not the proper way of proving any duty of a contractor.

The Court overruled the objection; to which ruling of the Court the defendant at the time duly excepted.

"A. Yes sir.

Q. Although, as you say, that would not tend to stop the boom from swinging in? A. No sir.

"Q. Take the edge of this table as the edge of the roof or the top part of a building forty odd feet high, taking this edge or the table as the north edge just as it lies here. Suppose that this roll of paper stands straight up and represents the mast of a, as I understand you call it, stiff leg derrick, and supposing that this roll of paper that I have, and which is attached to the west side of the first roll of paper, is what you term the boom; now, supposing that the rope is attached to the west end of the boom, that is, the end of the boom furthest from the mast, and a man stands back on the building, south of [ehe] edge, with this rope in his hands; now suppose further that a bucket of concrete, which is suspended from the
116 rope which runs to that boom, as Mr. Turpin has described, has been raised, and the boom has been swung south and the bucket dumped; now, suppose further that the men who dumped that bucket are ready to swing the boom out again and lower the bucket; now suppose they push that bucket with their hands to give it a start, but one of them retains hold of the rope; now, as I understand you to say, and I want to get this clear, they could by means of holding to that rope stop the boom at any place they desired, on the swing out? A. Oh, yes sir.

"Q. You said, in reply to one of Mr. Turpin's questions, that the only safe way to operate this derrick was to have a lever on the mast. Will you kindly, for my information and benefit, describe what that lever would do, supposing these papers here to represent the boom and mast?"

Mr. Histed: Assuming that certain testimony, which has been ruled out at this time, might be admitted, this was cross-examination. It shows clearly from the testimony that it is an opinion of the witness about what was proper practice, and does not deal with the usual and customary practice among those following this line of business.

The Court: I hardly think this is a question of expert knowledge. I think the test here is what men engaged in such business usually do. I will sustain the objection.

To which ruling of the Court the plaintiff at the time duly excepted.

Mr. Turpin: We will withdraw the last question and answer that we read, if the Court please.

The Court: Very well, and the jury will not consider the same.

117 "Q. Which way would that lever run, as we have this derrick arranged here on this table?"

Mr. Histed: The defendant objects to this question because there is no testimony showing it is the ordinary custom to have levers.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. It would run east and west?"

Mr. Histed: The defendant objects to the question because there is no testimony showing it is the ordinary custom to have levers.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

"Q. It would run east from the mast?"

Mr. Histed: The defendant objects to the question because there is no testimony showing it is the ordinary and usual custom to have levers.

The Court sustained the objection to which ruling of the Court the plaintiff at the time duly excepted.

"Q. Would it extend west of the mast or would it just be fastened there?"

Mr. Histed: The defendant objects to the question because there is no testimony showing it is the ordinary and usual custom to have levers.

The Court sustained the objection; to which ruling of the Court the plaintiff at the time duly excepted.

Mr. Turpin: We will not offer any more of this cross-examination at this time.

The Court: Very well.

118 Mr. Morris: The plaintiff now offers the deposition of Stephen J. Hayde, of Kansas City, Missouri.

"Direct-Examination by Mr. Turpin.

"Q. State your name, age, residence and occupation? A. My name is Stephen J. Hayde; my age is forty-three; my residence is Kansas City, Missouri; my occupation is building and contracting.

Q. How long have you been in the building and contracting business, Mr. Hayde? A. Twenty-two or three years.

Q. During that time have you had any occasion to use derricks in the construction of buildings? A. Yes, sir, we use derricks a good deal in our business.

Q. Are you familiar with the construction and operation of derricks used in the construction of buildings? A. Yes, sir.

Q. To what extent are you familiar with them?

A. Well, to the extent of having made and built what I consider good derricks.

Q. Do you know how a derrick should be constructed?

By Mr. Hogsett: I object to that, unless counsel will state what kind of a derrick he means.

Q. Well, generally, do you know how to construct derricks?

A. I can build derricks to suit myself, yes, sir.

Q. What class of buildings have you constructed, Mr. Hayde, mostly?

A. Well, mostly what would be considered in Kansas City heavy buildings.

Q. Have you had occasion to use derricks on all those buildings?

A. I think so. I don't know of any that we didn't.

Q. Were you familiar with the practical operation of the most of those derricks?

A. I would like to have you explain what you mean by that question, Mr. Turpin.

Q. Did you know, in most of those cases, about what kind of derricks they were and how they were operated?

A. Yes, sir, in a general way. I didn't spend my
119 time watching them being operated.

Q. What is a stiff leg derrick, Mr. Hayde?

A. Well, a stiff leg derrick is a derrick made of, you might say, five pieces of timber, a mast and two stiff legs, practically forming two triangles, with the mast making the vertical side to the triangle. Then it has a boom which is coupled at the base of this mast, which drops at an angle of whatever degree you want to call it. That is raised and lowered as you see fit, to give you greater reach, or less, as you may want to handle it. Then that is operated with a rope that runs through by the mast and out through the shoe and attached to the engine Sometimes a stiff leg is handled with what they call a crab that is lashed to the mast, and operated with a windlass by hand. They are not always operated by steam.

"Q. If what is known as a stiff leg derrick is placed at the top of a building for the purpose of raising material for work on the building, and the material is hoisted in a bucket or tub attached to a rope run through the derrick and attached to an engine which furnished the power for hoisting the bucket, and the derrick swings out over the outside of the wall of the building and is then raised by the engine, and is then swung around so that the bucket may be dumped at a convenient place on the building, what is the usual method of moving and swinging

and controlling the boom of such a derrick so as to swing the boom of the derrick and the bucket in to place the material, and out to place the bucket on the outside of the wall?

By Mr. Hogsett: The question is objected to for the reason that the witness has not shown himself competent to testify on that point."

The Court overruled the objection.

"A. With a band lever clamped to the mast of the boom."

Mr. Morris: This is all of Mr. Hayde's depo-
120 sition that we believe comes within the Court's ruling.

Mr. Histed: I desire to offer a portion of the cross-examination, as follows:

"Cross-Examination by Mr. Hogsett.

"Q. Your work, if any, in actually manipulating these derricks has been very limited?

A. You mean to say putting my hands on those things?

Q. Yes, sir. A. Very limited.

Q. Have you ever done it at all?

A. I presume I have helped hold a guy rope when they was rigging a derrick.

Q. A guy rope? A. Yes, sir.

Q. Do you mean a rope attached to the boom? A. No, sir.

Q. That is, when they were rigging it? A. Yes, sir.

Q. When you first put it up?

A. Yes, sir. I suppose I have turned the crank a good many times when a fellow would get stuck, and when using a crab on a derrick I would give him a lift.

Q. You emphasize the "very" limited?

A. Yes, sir. I mean I have not been a derrick man, or an engineer, or anything of that kind about a building. My principal occupation has been in the line of superintending and directing the work.

Q. So that what you say about the best way to regulate these derricks is gleaned mostly from your observation?

A. No, sir. I hardly think that anything a man learns from his business, he gleans it from observation.

Q. You get that from the knowledge of your business, and other men doing that for you?

A. That is true, but under my direction. The man who directs the putting up of a derrick, there may not be another man around the building except a common laborer, and
121 probably if that man who directs the setting up of a derrick should go away, they couldn't put it together.

Q. Your experience with reference to turning the mast or boom, as you probably know was done in this case, has been very limited, comparatively?

A. Well, I can say that as far as I am concerned, this manner of handling a derrick, that is, moving the boom in and out in this manner, that is something I have seen very little of.

Q. How do you mean? With a rope? A. Yes, sir.

Q. The question was, your experience with reference to any connection with moving these booms or masts from side to side, swinging the boom in and out from side to side?

A. You mean my actually taking hold of it?

Q. Yes, sir. A. That has been very limited.

Q. Exceedingly limited? A. Yes sir.

Q. Most of what you know is from seeing other men do that same thing?

A. No, sir, that is the way I learn my business. I tell other people what to do and they do what I tell them.

Q. Among those things you tell them is to swing that boom? A. In order to handle the derrick.

Q. And how to swing these booms?

A. Yes sir. I don't stand around and look at people and guess at what I want done.

Q. You said in your direct-examination that you had built derricks to suit yourself? A. Yes sir.

Q. You are the only man who ever did build a derrick to suit, are you not?

A. I could hardly say that. I have had derricks built under my direction, and stiff leg derricks, and other people who rented them from me seemed to think they were very good derricks. There is very little difference in stiff leg derricks, except in strength and the reach of the boom.

Q. You say your experience with a derrick minus a lever has been very limited; that is, that you don't use
122 them—or have you used them? I will ask you that question?

A. Well, I have used derricks under practically those conditions.

Q. Did you have any lever at all? A. Without a lever.

Q. Did you have a rope? A. I had a guy line with a man on the line from below.

Q. Was that put up on the building? A. Yes sir.

Q. Have you used this same system? A. No sir, I never have. I beg your pardon?

Q. What did you mean? I understood you to say you had?

A. No sir. I say under practically those conditions.

Q. I mean have you ever used a derrick with only a rope to control the boom? A. You mean with just a rope, as described in this case?

Q. Just as Mr. Turprin has described A. Not that I have any knowledge of now.

Q. You never have used it? A. No sir.

Q. The only kind you have used has been the lever kind?

A. Well, no sir. I have used, as I started to state before, where I have not used a lever, I have used a guy line.

Q. Is that the same as Mr. Turpin has described?

A. No sir.

Q. What is the difference? A. The difference is that it is at the head line.

Q. What is that? A. Just as you have described. That line they put the derrick up with. When the boom was out, we would set the derrick a little bit out of level, so that when the boom was down it would lean to that point. The boom would lean to that point, and then attach to the load, whatever the load would be, let it be a box or a tub. A man standing on the ground would run a guy line up and follow that tub up, and when that was to the proper height the man above would give the signal and the man below on the line
123 would lay way and the other man would hold it up.

Q. This line you refer to was attached to the load itself? A. To the box or tub.

Q. You have never seen the system adopted in this case —a rope attached to the boom for the purpose of pulling it in?

A. Yes sir. We had the same thing in this case.

Q. Did you find that satisfactory? A. Well, we used the two together.

Q. You had two lines? A. Yes sir.

Q. You have never used one line, as in this case?

A. No, sir.

Q. The only time you ever used any at all was when you used two? A. Yes sir.

Q. For the purpose of balancing? A. Guiding the load.

Q. You could not say whether or not one line would be ample for the purpose, could you, since you have never used one? A. I would say that it would not.

Q. How do you know? A. If one line would do, I would have had only one."

Mr. Turpin: We will now offer portions of the cross-examination of the deposition of the witness W. N. Gedny, the direct-examination of which has been read heretofore.

"Q. In your opinion, the only respect in which the derrick described by Mr. Turpin was not properly operated was that it did not have a lever on the staff or mast to control the boom?"

Mr. Histed: The defendant objects to the question because it calls for the opinion of the witness.

124 The Court: I think that this is not so much a question of expert testimony as of usage by other men engaged in the same line of business.

Mr. Turpin: He has qualified as to the experience he has had, and he speaks of the proper manner.

The Court: I do not think it is a question of the proper manner so much as what kind of appliances others use. This last witness on the stand testified that the usage or custom is to use a derrick and lever. That is proper evidence, but I am inclined to think this is not.

Mr. Turpin: It has been shown by Mr. Hayde's testimony that the usual custom was to have a lever to turn it, and the testimony of this witness shows the purpose the lever serves.

"Q. You said, in reply to one of Mr. Turpin's questions, that the only safe way to operate this derrick was to have a lever on the mast. Will you kindly, for my information and benefit, describe what that lever would do, supposing these papers here to represent the boom and mast?"

Mr. Histed: The defendant objects to that because it is a mere argument of the witness, even assuming that a lever might have been proper to use.

The Court overruled the objection; to which ruling of the Court the defendant at the time duly excepted.

"A. You would have a lever attached to the main mast, run out far enough for the power of one man to control the boom.

Q. Which way would that lever run, as we have this derrick arranged here on this table? A. Your boom is always to the west; your main lever would run to the east.

125 "Q. It would run east and west? A. Yes sir.

"Q. It would run east from the mast? East from the main mast.

"Q. Would it extend west of the mast, or would it just be fastened there? A. It would not extend any west, as the mast would catch part of this boom.

"Q. If it is fixed as you have described it, on the south side of the mast, how far from the base of the mast would it be? A. About thirty inches.

"Q. That is, where a man could get hold of it easily, standing on the floor? A. Yes sir.

"Q. That is fixed solidly to the mast? A. Yes sir.

"Q. Like this, we will say? A. Yes sir.

"Q. Suppose he turns that boom to the north, what good

does that do? A. Your line would be out here, so you could not turn it any further to the north, that a man couldnt get hold of it.

"Q. The point about the lever is that by having the end attached to the mast solidly, by holding to the lever you can prevent the boom from swinging one way or the other?

"A. Yes sir.

"Q. But, as I understand you, a rope attached to the end of the boom would serve the same purpose on the swing out, although not on the swing in? A. Yes sir, if they would hold it."

"Q. In your work, what are you? A. General superintendent.

"Q. You go out on the work, do you? A. Yes sir.

"Q. Do you control these levers? Do you take hold of them yourself? A. No sir.

"Q You just see other men do that? A. I see that the men do.

"Q. I suppose you have done that in the past? A. Yes sir.

"Q. How long did you serve in that capacity? A. A very short time, off and on.

"Q. Just when a man would be absent? A. Yes sir.

Q. Your regular business is not to control those der-
126 ricks? A. No sir.

Q. You are superintending the work? A. Yes sir.

Q. And a laborer does that work? A. Yes sir.

Q. So that what you know about it is gathered from occasionally doing it yourself and watching other men do it?

A. Yes sir. I know that it should be done.

Q. What you know about it has been gathered from what you have seen yourself in other men doing it, and the few times you have done it yourself?

A. Well my main experience has been in my own control of the derrick.

Q. Then you have not gathered any of the information from seeing other men do it? A. Yes sir.

Q. Then my first question is correct; that is, what you know about it is gathered from seeing others do it and the few times you have done it yourself?

A. Not a few times; all my life.

Q. You havent been doing that all the time, have you?

A. No sir, but there is never a day but what I have.

Q. I thought you said a moment ago it was a few times?

A. Off and on on every job. There was never a job but I did that lots of times.

Q. I understood you to say a few times. But any way, it has been gathered from what you have done and seeing others?

A. Yes sir my own experience and seeing others.

Q. You say the only safe way to do this is to have that lever? A. Yes sir.

Q. How do you know that? A. By experience.

Q. Then, as I understand you, you have always used this lever? A. Yes sir.

Q. You dont know how it would work with a rope? You dont know whether that would be safe or not?

A. Yes sir. I have had men rig derricks and try it until I got on the job and made them put it up right.

127 Q. And when you saw a rope used, you saw the man hold it and haul the boom up to keep it from swinging around, and you saw the rope worked in that way to keep the boom from swinging away from the mast?

A. Yes sir, if properly attended to.

Q. Mr. Gedny, when one of these stiff leg derricks is placed upon the edge of a building, as I have indicated, it is in plain sight, of course?

A. Well, it is plain sight for everybody above.

Q. That is, it is in plain sight for everybody on the roof, if it is placed on the roof?

A. Not altogether. There may be some obstructions of walls or something and he might not be able to see it until it got within four feet of him.

Q. If there was no wall; if a man was standing on the edge of the roof, and the derrick was south of him four or five feet, there is no reason why he couldn't see it, is there?

A. No sir, but a man as a rule is not always looking for that derrick.

Q. Given the set of circumstances I have described, could he see it?

A. If he was not attending to any other business.

Q. If he could look at it he could see it? A. Yes sir.

Q. There is nothing in the circumstances that I have described that would keep him from seeing it, if he could see it?

A. No sir.

Q. The signals you speak of refer to the men on the ground, out of sight of the derrick, dont they?

A. Not altogether, no, sir. That signal is made so anybody about the building, as well as the derrick, will know it. It is a warning to everybody.

Q. Did you ever have a derrick situated like this one was, as we have described it to be? A. Yes, sir.

Q. If a man was standing on the edge here, when the derrick had been working continuously back and forth every fifteen minutes all day, all week, or all month, you dont warn him, do you?

A. Yes sir.

Q. Do you think it necessary to warn that man,

128 when he has stood there and seen that bucket brought up and swung out every fifteen minutes for a month?

A. I do.

Q. Do you warn him? A. I do.

Q. How do you, if you do?

A. By some signal from that man stationed at the derrick.

Q. What is the signal?

A. That may be governed by any code of signals. It is generally a whistle.

Q. Suppose a man would push that bucket out and shout "Look out below," or "Here she comes," loud enough for a man down here on the ground, forty-two feet, to hear him, wouldnt you think, as a man of ordinary sense, that a man five feet from him could hear him?

A. No sir. There may be a dozen different workmen that that would use the same call. If a little brush of dirt brushes over, that is the first thing they say.

Q. Providing that signal was often used for other purposes, a man might not pay attention to it? A No sir.

Q. Supposing that signal was not used for anything else except to warn those men on the ground to look out for the bucket? A. That could not be done.

Q. You mean that is not done with your work?

A. No sir.

Q. You dont know that it was not done here?

A. No sir.

Q. Suppose the facts are as I have described them to be; that that was the only purpose for which that signal was used, to warn the men below to get ready to receive the bucket and fill it again, wouldnt you say that if the warning back here was loud enough for the man forty-two feet below to hear it that a man five or ten feet from the edge of the wall could hear it?

A. He may hear it, but those same words are hollowed forty times a day.

Q. Suppose there is no yell at any other time. Suppose the only purpose for which it is given is to warn these

129 men below?

A. Yes sir, if you could keep everybody's mouth shut and use it for that one signal, it would be all right.

Q. I say if that was the only purpose for which it was used?

A. Yes sir.

Q. You think you could hear it? A. Yes sir.

Q. There is no doubt about that? A. No sir.

Q. None whatever, is there? A. No sir.

Q. How often, in concreting a roof, would a bucket of concrete three feet in diameter and three feet deep be raised?

A. That would depend, of course. They may be every three minutes, or five, or ten.

Q. Anywhere from three to ten minutes? A. Yes sir.
Q. That is your experience? A. Yes sir.
Q. That that is true? A. Yes sir.
Q. Those buckets are hoisted up full of cement once every three to ten minutes, between those periods of frequency?
A. Yes sir.
Q. They are swung out just as many times?
A. Certainly, yes sir.
"Q. Then, as a rule, you put the derrick on the edge to hoist up material?
A. In most cases we do. That is owing to circumstances.
Q. After having had all that experience, you still maintain that using a rope attached to the end of a boom, and having it handled properly, will serve to stop that boom on the swing just as satisfactorily as using a lever. A. Oh, no.
Q. I understood you to say that?
A. No, sir, I say it will stop it, maybe, in ordinary weather.
Q. Providing there is no wind? A. Yes sir.
Q. Using a rope attached to the end of the boom, handled properly, will stop the boom on the swing out, providing the climatic conditions are correct, just as satisfactorily as
130 a lever, with the exception that it will not control it on the swing as satisfactorily as a lever? A. No sir. It will not control it as satisfactorily in any way at all.
Q. You can stop it, cant you? A. Yes sir.
Q. You can stop it just as satisfactorily as you can with a lever, cant you? Isnt that a matter of common reason, that by holding on to the end of a rope, with the boom moving away from you, you can stop it on the swing out just as satisfactorily as you can with a lever, and even more so, cant you? A. No sir.
Q. Can you stop it as satisfactorily? A. No sir, I say you cant.
Q. With the weather conditions satisfactory? A. In stopping a boom, you may stop it ordinarily, but the swing would have a tendency to bring in back the other way again. You may stop it that way, ordinarily.
Q. I am not talking about stopping it that way. That would be a foolish trick. You can stop it the same way just as satisfactorily as with a lever? A. No sir, you can stop it, but not as satisfactorily.
Q. Cant you stop it in a gradual manner? A. No sir.
Q. Why not, by letting out your rope? A. You cant do it. A man cant control a rope like he can a bar or big lever.

Mr. Turpin: That is all of the cross-examination that we desire to offer.

Mr. Histed: I wish to read just a few questions and answers in the cross-examination of the witness, W. N. Gedny, following those read by Mr. Turpin.

"Q. Have you noticed whether or not they used derricks with a lever on them in any other places than where you worked? "A. I pay very little attention to other people's
131 business.

"Q. Then you could not say as to that? A. No sir.

"Q. As to whether anybody else uses that kind of a derrick or not? A. No sir, I never examined to see.

"Q. You never have? A. No sir.

"Q. Then all you know about this, Mr. Gedny, is just what you have done yourself? A. Certainly; work I have been on myself."

* * * * * *

136 (Thereupon the plaintiff rested his case.)

The Defendant Demurs.

At the conclusion of the plaintiff's evidence, and in proper time, the defendant, Westinghouse, Church, Kerr & Company, presented to the Court, and filed with the Clerk of the Court, its [demurred] to the evidence of the plaintiff herein, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Kansas, First Division.

Eugene Kreigh, Plaintiff,
vs.
Westinghouse, Church, Kerr & Company, Defendant.

Demurrer to Evidence.

Now comes the defendant, Westinghouse, Church, Kerr & Company, the plaintiff having introduced his evidence and rested, and demurs thereto for the reason that the same
137 does not show any cause of action in favor of the plaintiff and against the defendant as set out in the plaintiff's petition.

HARKLESS, CRYSLER & HISTED,
Attorneys for Defendant.

Endorsed: No. 8323. Kreigh v. Westinghouse, Church, Kerr & Co. Demurrer to Evidence. Filed Dec. 2, 1905. Geo. F. Sharitt, Clerk.

Demurrer Sustained.

Thereupon, after argument of counsel, and after due consideration, the Court sustained said demurrer; to which ruling

and action of the Court in sustaining said demurrer the plaintiff at the time duly excepted.

The above and foregoing constitutes all the testimony and statement of all the evidence introduced and offered upon the trial of this cause, together with all objections, rulings and exceptions saved, demurrer to plaintiff's evidence, ruling thereon, and exception.

138 Thereupon, on the 20'' day of February, A. D. 1906, within the time fixed by the court for that purpose, the said plaintiff, Eugene Kreigh, presented to the court the foregoing as his Bill of Exceptions in said case, and prayed the court to allow and sign the same and order that said Bill of Exceptions be made a part of the record in this case; all of which is done and ordered as said plaintiff prayed.

Said Bill of Exceptions is therefore now allowed and signed by the Court and ordered to be filed and made a part of the record, this 20'' day of February, 1906.

JOHN C. POLLOCK, Judge.

Endorsed: No. 8323. Eugene C. Kreigh v. Westinghouse, Church, Kerr & Company et al. Bill of Exceptions. Filed Feb. 20, 1906. Geo. F. Sharitt, Clerk.

In the Circuit court of the United States for the District of Kansas, First Division.

139 Eugene C. Kreigh, Plaintiff,
8323 vs.
Westinghouse, Church, Kerr & Company, et al., Defendants.

Assignment of Errors.

This plaintiff in this action in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause to-wit:

That the Circuit Court erred in excluding certain evidence offered upon the trial of this cause by this plaintiff.

That the Circuit Court erred in sustaining the defendant company's demurrer to the plaintiff's evidence herein.

That the Circuit Court erred under the evidence introduced by plaintiff in taking the case away from the jury and rendering judgment for the costs against the plaintiff.

That the Circuit erred under the testimony introduced by the plaintiff, in not submitting the case to the jury for their determination under proper instructions.

That the Circuit Court erred in holding that plaintiff had not introduced sufficient testimony to show, prima facie, that he was entitled to recover.

ELLISON & TURPIN.
McFADDEN & MORRIS.
Attorneys for Plaintiff.

Endorsed: No. 8323 U. S. Circuit Court. Eugene C, Kreigh, Plff. vs. Westinghouse, Church, Kerr & Co. Dft. Assignment of Errors. Filed Mch. 10, 1906 Geo. F. Sharitt, clerk. Ellison & Turpin, McFadden & Morris, Attys. for Plff.

In the Circuit Court of the United States for the Dis-
140 trict of Kansas, First Division.

Eugene C. Kreigh, Plaintiff.
8323 vs.
Westinghouse, Church, Kerr & Company, et al., Defendants.

Petition for Writ of Error.

And now comes Eugene C. Kreigh plaintiff herein, and says that on or about the second day of December, 1905, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of errors of which complaint is made, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

ELISON & TURPIN
McFADDEN & MORRIS,
Attorneys for Plaintiff.

Endorsed: No. 8323 U. S. Circuit Court. Eugene C. Kreigh, Plff. vs. Westinghouse, Church, Kerr & Co. Dft. Petition for Writ of Error. Filed Mch. 10, 1906 Geo. F. Sharitt, clerk Ellison & Turpin, McFadden & Morris, attys. for Plff.

Know all men by these presents, That we, Eugene C.
141 Kreigh as principal and N. C. Todd as surety are held and firmly bound unto Westinghouse, Church, Kerr Co. in the full and just sum of five hundred dollars to be paid to the said Westinghouse, Church Kerr & Co. its successors or

assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 9'' day of March in the year of our Lord one thousand nine hundred and six.

Whereas, lately at the November term, A. D. 1905, of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, in a suit depending in said Court between Eugene C. Kreigh plaintiff, and Westinghouse Church Kerr Co. defendant judgment was rendered against the said Eugene C. Kreigh and the said Eugene C. Kreigh has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Westinghouse, Church, Kerr & Co. citing and admonishing it to be and appear in the United States Circuit Court Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation,

Now the condition of the above obligation is such, that if the said Eugene C. Kreigh shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above abligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

EUGENE C. KREIGH (Seal)
142 N. C. TODD (Seal)

Approved by John C. Pollock, Judge. (Seal)

No. 8323 United States Circuit Court, First Division of the Judicial District of Kansas. Eugene C. Kreigh vs. Westinghouse Church Kerr & Co. Bond $500.00 Filed March 10 1906 Geo. F. Sharitt Clerk.

United States of America
143 District of Kansas,—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in said court in Case No. 8323 wherein Eugence C. Kreigh is plaintiff and Westinghouse, Church, Kerr & Company are defendants.

I further certify that the Original Citation and Writ of Error are hereto attached and returned herewith.

The Seal of the Circuit Court of the United States District of Kansas. 1862

In testimony where, I have hereunto set my hand and affixed the Seal of said court at my office in Topeka, in said District of Kansas, this 15th day of December A. D. 1906.

GEO. F. SHARITT, Clerk.

Filed April 6 1906 John D. Jordan, Clerk.

93 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record of ninety-two pages in the case of Eugene C. Kreigh, Plaintiff in Error, vs. Westinghouse, Church, Kerr and Company, No. 2423, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of September, A. D. 1907.

[Seal]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the third day of December, A. D. 1906, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the sixth day of April, A. D. 1906, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Eugene C. Kreigh was Plaintiff in Error and Westinghouse, Church, Kerr and Company was Defendant in Error which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2423.

That thereafter the following proceedings were had in said case, in said Circuit Court of Appeals, viz:

2 (Appearance of Mr. Edward D. Ellison and Mr. Rees Turpin, Counsel for Plaintiff in Error.)

On the sixth day of April, A. D. 1906, the appearance of Mr. Edward D. Ellison and Mr. Rees Turpin, as counsel for plaintiff in error, was filed in said cause, in the words and figures following, to-wit.

United States Circuit Court of Appeals, Eighth Circuit.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

EDWARD D. ELLISON and
REES TURPIN.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2423. Eugene C. Kreigh, Plff. in Error, vs. Westinghouse, Church, Kerr and Company. Appearance. Filed Apr. 6, 1906. John D. Jordan, Clerk. Edward D. Ellison, Rees Turpin, Counsel for Plff. in Error.

(Appearance of Messrs. Harkless, Crysler & Histed, Counsel for Defendant in Error.)

And on the twenty-ninth day of September, A. D. 1906, the appearance of Messrs. Harkless, Crysler & Histed, as counsel for defendant in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company.

3 The Clerk will enter my appearance as Counsel for the Defendant in Error.

JAS. H. HARKLESS,
CHAS. S. CRYSLER,
CLIFFORD HISTED.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2423. Eugene C. Kreigh, Plff in Error, vs. Westinghouse, Church, Kerr and Company. Appearance. Filed Sep. 29, 1906. John D. Jordan, Clerk. James H. Harkless, Charles S. Crysler, Clifford Histed, Counsel for Deft. in Error.

(Appearance of Mr. Robert E. Morris, as Counsel for Plaintiff in Error.)

And on the tenth day of December, A. D. 1906, the appearance of Mr. Robert E. Morris, as counsel for plaintiff in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

ROBT. E. MORRIS.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit. No. 2423. Eugene C. Kreigh, Plaintiff in Error, vs. Westinghouse, Church, Kerr and Company. Appearance. Filed Dec. 10, 1906. John D. Jordan, Clerk. Robert E. Morris, Counsel for Plff. in Error.

(Order of Submission.)

And on the tenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

4 United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1906.

Monday, December 10, 1906.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Rees Turpin for the plaintiff in error; continued by Mr. James H. Harkless for the defendant in error and concluded by Mr. Rees Turpin for the plaintiff in error.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the sixth day of March, A. D. 1907, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

5 United States Circuit Court of Appeals, Eighth Circuit.

December Term, A. D. 1906.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

Mr. Rees Turpin and Mr. Robert E. Morris (Mr. Edward D. Ellison and Mr. John E. McFadden were with them on the brief) for plaintiff in error.

Mr. J. H. Harkless (Mr. C. S. Crysler and Mr. Clifford Histed were with him on the brief) for defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

Syllabus.

1. Negligence—Facts—Conclusion.

Roofers were using a derrick and bucket to hoist cement from the ground and unload it on the roof. No one but these workmen had been at work or moving about on the roof for several days. The brick walls had not reached the top of the building. The plaintiff was the superintendent of the brick work. They were all employees of the defendant. The roofers swung the boom and bucket in over the north wall by means of a rope attached to the end of the boom and sent it back by a push. Just as they pushed it back on one of its trips the plaintiff came up onto a plank just beyond the north wall, stepped into the path of the bucket and stood there looking north to direct the construction of a scaffold and the bucket knocked him off and injured him.

Held, the defendant was not guilty of negligence because it failed to establish a code of signals for the roofers to enable them to warn other employees of the approach of the bucket nor because the derrick was not provided with a lever nor the boom with a guy rope on its north side to steady and control its movements.

2. Negligence—Injury not Probable Result of, not Actionable, not Proximate Cause.

An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of an act of negligence is not actionable, because it is not the proximate cause,

but either the remote cause or no cause whatever of the damage.

6 3. Same—Where Work Necessarily Changes Character as to Safety, Duty of Care for Safety the Servant's and not the Master's.

The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety, as the work progresses, is the duty of the servants to whom the work is intrusted, and it is not the duty of the master.

4. Same—Duty to Protect from Dangers of Negligent Operation Servant's and not Master's.

The duty of construction and provision is the master's. The duty of operation and of protection from negligent use is the servant's.

The duty of so using a reasonably safe place, and of so operating a reasonably safe machine, that neither the place nor the machine shall become dangerous by their negligent use or operation, is the duty of the servants to whom the use or operation is intrusted, and it is not any part of the positive duty of the master.

Sanborn, Circuit Judge, delivered the opinion of the court.

The plaintiff, the foreman in charge of the brick work and certain roofers were engaged in constructing a building. The steel frame had been erected and was about 42 feet in height, the bricklayers were at work raising the walls which had not reached the roof and the roofers were laying cement upon the top of the building and were using a stiff leg derrick and an engine to hoist the material. This derrick was near the northeast corner of the structure and the cement was on the north side of the building. To a rope which extended over a pulley on the end of the boom a bucket was attached. This was the method of operation: This bucket was filled with cement and raised by means of the engine and rope to a point a little higher than the top of the building and was then swung in over the roof by means of a guy rope attached to the end of the boom on its south side. The cement was then dumped from the bucket and the roofers pushed the empty bucket back with sufficient force to cause it to swing clear of the north wall, and it was then lowered to the ground for another load. The plaintiff had been at work on this building, and the roofers had been raising the cement in this way for some days, so that the plaintiff knew the location and the general operation of the

derrick. As the concrete was hoisted the bucket was swung in over the north wall at the same place and in the same path each time. No one but the roofers was, or had been at work, or moving about on the top of the building for several days. Under these circumstances, when, upon one of its trips, the bucket had been hoisted, drawn in over the north wall and dumped, the plaintiff climbed upon a plank on the north side of the north wall to superintend the construction of a scaffold below, and stood there looking north at the exact place where the bucket swung over the wall at the exact time that the roofers pushed it back for another load. The bucket knocked the plaintiff to the ground and severely injured him.
7 At the time of the injury he had been above the top of the building from 50 seconds to three minutes. There was no evidence that he attempted to notify the roofers of his presence or that they were aware of it. Upon this state of facts the plaintiff sought to recover of the defendant for his injuries on the ground that they were caused by its negligence in that it did not establish a system of signals to be used by the roofers to warn employes when the bucket was to cross the wall and in that it did not provide the derrick with a lever, or the boom with a guy rope on its north side to steady and control its movements, and the error assigned is that the court instructed the jury to return a verdict for the defendant.

Negligence is a breach of duty. Where there is no duty or no breach, there is no negligence. An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act or omission is not actionable, and such an act or omission is either the remote cause or no cause whatever of the injury. Cole v. German Savings & Loan Society, 124 Fed. 113, 115, 59 C. C. A. 593, 595. If the defendant had directed the plaintiff to work in the path of this bucket, if he could have performed his service in no other place, and if in the discharge of his duty he could not have foreseen or protected himself against its approach, it might have been the duty of the defendant to establish a code of signals and to so construct the derrick that the bucket could not have struck him unawares and this because his injury might have been reasonably anticipated from a failure to exercise such care. Western Electric Co. v. Hanselmann, 69 C. C. A. 348, 136 Fed. 566; The Magdaline, 91 Fed. 798, 800. But the plaintiff was free to discharge his duty of superintendence at any place on or about the building. He could have performed it as efficiently without, as within the track of this bucket. Neither he nor anyone except the roofers had been at work or moving about upon the top of the building for several

days and no one could have reasonably anticipated that he would suddenly rise above the roof and station himself upon the plank in the path of the bucket without notice to its operators and without watching for its approach. His injury was not the natural or probable result of, it could not have been anticipated from the lack of a code of signals when there had been no one on the building to signal to for days, nor from the lack of a lever on the derrick with which to swing the boom, nor of a guy rope on the north side to draw it across the wall. As the accident could not have been foreseen to be the natural or probable result of the failure to provide signals, lever or guy rope, the defendant owed the plaintiff no duty to do so and was guilty of no actionable negligence. Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliott, 5 C. C. A. 347, 350, 55 Fed. 949, 952; Railway Co. v. Kellogg, 94 U. S. 469, 475, Hoag v. Railroad Co., 85 Pa. St. 293, 298, 299.

The rule of safe place is inapplicable to this case. The duty of construction and provision is the master's. The duty of operation and protection from negligent use is the servant's. The duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the
8 machine shall become dangerous by their negligent use or operation is the duty of the servants to whom the use or operation is entrusted, and it is not any part of the positive duty of the master. The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety as the work progresses is the duty of the servants to whom the work is entrusted, and it is not the duty of the master. American Bridge Co. v. Seeds, .. C. C. A. .., 144 Fed. 605, 611 to 613, and cases there cited. The plaintiff and the roofers were fellow servants engaged in the common undertaking of constructing the building for a common master. The place where the building was constructed, the materials and the machinery were free from any defects which contributed to this injury. A lever on the derrick to swing the boom or a guy rope on the north side of the boom to pull it over the wall would not have prevented the injury if the plaintiff had given no notice of his presence and the operator of the lever or of the guy rope had not seen him or notified him of the approach of the bucket. In other words, if the plaintiff himself and his fellow servants had pursued the same course with the lever and the guy rope as they pursued without them, the same result would inevitably have followed. Moreover, the only purpose of the lever or of the guy rope upon the north side of the boom would be to control the movement of the boom so that the bucket would not strike the plaintiff.

But their absence did not prevent such a control because there was a guy rope on the south side of the boom the end of which lay upon the roof of the building with which the roofers might have effectively controlled the northern movement of the boom and the bucket. The truth is that if there was any negligence in this case, it was the negligence of the operation of a reasonably safe machine in a reasonably safe place. It was the negligence of the fellow servants of the plaintiff or of the plaintiff himself and the defendant was free from any act or omission from which the accident could have reasonably been anticipated or from which it would have resulted had it not been for the subsequent interposition of other human agencies. There was no error in the ruling of the trial court and the judgment below is affirmed.

Filed March 6, 1907.

9 (Judgment.)

And on the sixth day of March, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following- to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1906.

Wednesday, March 6, 1907.

Eugene C. Kreigh, Plaintiff in Error,
No. 2423. vs.
Westinghouse, Church, Kerr and Company.

In Error to the Circuit Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Westinghouse, Church, Kerr and Company have and recover against Eugene C. Kreigh the sum of twenty dollars for its costs herein and have execution therefor.

March 6, 1907.

10 (Clerk's Certificate.)

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing nine pages contain full, true and complete copies

of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (except the transcript of the record from the Circuit Court of the United States for the District of Kansas), in a certain cause in said Court wherein Eugene C. Kreigh is Plaintiff in Error and Westinghouse, Church, Kerr and Company is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record on my office.

I do further certify that on the seventh day of May, A. D. 1907, a mandate was issued out of said United States Circuit Court of Appeals, directed to the Judge of the Circuit Court of the United States for the District of Kansas.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of September, A. D. 1907.

[Seal]

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States, October Term, 1907.

No. 475.

EUGENE C. KREIGH, Petitioner,

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, Respondent.

Stipulation.

Whereas, In the above entitled cause said plaintiff Eugene C. Kreigh as petitioner, filed an application in the said Supreme Court of the United States in the above cause for a writ of certiorari therein to the United States Circuit Court of Appeals for the Eighth Circuit; and,

Whereas, In connection with the said petitioner's said application for said writ of certiorari, a certified copy of the transcript of the record was duly filed in said Supreme Court of the United States, and twenty-five uncertified copies of the transcript of the record in said cause were also filed, so that the complete record of said case is already on file in the said Supreme Court of the United States; and,

Whereas, Said Court on the 28th day of October, 1907, ordered and issued its writ of certiorari to said United States Circuit Court of Appeals for the Eighth Circuit, removing the above entitled cause from said United States Circuit Court of Appeals for the Eighth Circuit to the United States Supreme Court:

Now, therefore, It is stipulated by and between the said parties in said cause that the said certified transcript of the record that is already on file in said Supreme Court of the United States, may be taken and treated as the return by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to said writ of certiorari, and that the said Clerk of the said United States Circuit Court of Appeals for the Eighth Circuit, may, in lieu and instead of a transcript of the record as required by said writ, send to the said United States Supreme Court a copy of this stipulation, and that said cause may proceed and be heard with the same force and effect as if the said Clerk of the said Court of Appeals had duly certified the record of said cause in obedience to said writ of certiorari issued herein, it being the intention of this stipulation that the records so already filed in connection with the application of petitioner for said writ of certiorari shall be taken and treated as a full return to said writ and that the cause shall be heard and considered as if a return to the writ had been made.

REES TURPIN,
JAMES S. BOTSFORD,
Attorneys for Plaintiff and Petitioner, Eugene C. Kreigh.
JAS. H. HARKLESS,
C. S. CRYSLER,
Attorneys for Defendant, Westinghouse, Church, Kerr & Co.

(Endorsed:) No. 2423. Eugene C. Kreigh, Petitioner, *vs.* Westinghouse, Church, Kerr & Company, Respondent. Stipulation as to return to Writ of Certiorari. Filed Nov. 9, 1907. John D. Jordan, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Eugene C. Kreigh is plaintiff in error, and Westinghouse, Church, Kerr & Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Kansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 20,878. Supreme Court of the United States. No. 475, October Term, 1907. Eugene C. Kreigh *vs.* Westinghouse, Church, Kerr & Co. Writ of Certiorari. Filed Nov. 9, 1907. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Eugene C. Kreigh, Plaintiff in Error, *v.* Westinghouse, Church, Kerr & Company, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twelfth day of November, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 20,878. Supreme Court U. S. October Term, 1908. Term No. 188. Eugene C. Kreigh, petitioner, *vs.* Westinghouse, Church, Kerr & Co. Writ of certiorari and return. Filed Nov. 16th, 1907.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

EUGENE C. KREIGH,
Petitioner,

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, a corporation,
Respondents.

No.

Petition of Petitioner, Eugene C. Kreigh, for a Writ of Certiorari to the Circuit Court of Appeals of the United States for the Eighth Circuit.

I.

This petition for *certiorari* is based upon two grounds. First, that the United States Circuit Court for the District of Kansas, to which this case was removed by respondent from the District Court of Wyandotte county, Kansas, and in which United States Circuit Court this case was tried, had no jurisdiction thereof, and that therefore the judgment against petitioner, of said United States Circuit Court for the District of Kansas and of the United States Circuit Court of Appeals for the Eighth Circuit affirming the same, was erroneous.

The second ground for this his petition for a *certiorari* is that the United States Circuit Court which tried this case and the United States Circuit Court of Appeals which affirmed that judgment, both erred in their decisions against petitioner, and that the judgment and opinion of the Circuit Court of Appeals in this case affirming the said judgment of the Circuit Court of the United States is contrary to the general course of decisions on the point involved which have been given by the United States Circuit Court of Appeals of the other circuits, and that the question in this case on the merits is one of great public importance.

Of course the second ground assigned as a reason for granting the petition for *certiorari* herein, relating, as it does, to the merits of this action, will not be considered if the court, in considering this petition for *certiorari,* sustains the first point of petitioner as to the want of jurisdiction. The point as to want of jurisdiction in the trial and Circuit Court of Appeals in this case, arises out of the following facts:

The suit was brought by petitioner against respondent as already stated, in the District Court for the County of Wyandotte, State of Kansas, on December 24, 1904, on which day the petition of petitioner against respondent was filed in said Wyandotte County District Court. The action was to recover $15000 damages sustained by petitioner from the negligence of respondent. Petitioner was the plaintiff in that action, and respondent was defendant.

The injury to plaintiff, for which the suit was brought, occurred on October 25, 1904, in said Wyandotte County, Kansas. Summons was issued and served on the defendant, who is the respondent here, on December 24, 1904 (pp. 3-4-5-6 Rec.) Prior to the time for filing answer, defendant (respondent here) filed in said District Court of Wyandotte County, Kansas, its petition and bond for the removal of this cause to the United States Circuit Court for the District of Kansas. (pp. 8-9 Rec.) The Wyandotte County District Court made its order based on said removal petition, for the removal of this cause to the said United States Circuit

Court for the District of Kansas. (p. 10 Rec.) The jurisdiction of the Circuit Court of the United States for the District of Kansas which tried this cause, depends upon the averments in said removal petition. (p. 8 Rec.) The ground of jurisdiction averred by said removal petition, is that of diversity of citizenship between plaintiff and defendant. The removal petition, which was sworn to and taken as true, averred that defendant, Westinghouse, Church, Kerr & Company, was at the commencement of this suit and still was a corporation and a resident and citizen of the state of New Jersey, and that petitioner, Eugene C. Kreigh was at the commencement of this suit and still was a citizen and resident of the State of Missouri.

On the facts thus averred in the removal petition, petitioner submits that no jurisdiction was ever conferred on the United States Circuit Court for the District of Kansas.

In support of this proposition, petitioner cites the recent decision of this court in the case of *ex parte Wisner,* 203 U. S. Rep., 449. It is true that in the said case of Wisner the suit was against an individual, while the suit at bar is against a corporation; but your petitioner submits that there is no different rule in regard to the removal of a case against a corporation than there is where the case is against an individual. See *Shaw* v. *Quincy Mining Co.,* 145 U. S., 444, and the remarks of Mr. Justice Gray, commencing at the bottom of p. 449.

In the case at bar, the return of service of the Sheriff of Wyandotte County, Kansas, (pp. 6-7 Rec.) shows that the defendant corporation was not even an inhabitant of the State of Kansas. But if the defendant corporation had been such inhabitant, the above cases of *Shaw* v. *Quincy Mining Co.* and *Wisner,* decided by this court, settle the point that this suit could not have been brought in the United States Circuit Court for the District of Kansas, and since this suit could not have been brought originally in the United States Circuit Court for the District of Kansas, it was not removable. This suit could only have been brought orig-

inally in the Circuit Court of the United States, in one of the Missouri districts or in New Jersey, where one of the parties had its citizenship and residence. But a case instituted in a state court in Kansas could not be removed to the United States Circuit Court sitting in Missouri or New Jersey. Therefore this case was not removable.

The second and third sections of the Judiciary Act of 1887 and 1888 provide that a case cognizable in a federal court may be removed "to the Circuit Court of the United States for the proper district." But said removals must always be to the United States Circuit Courts of the districts in which the state courts where the cases are brought sit; and since in this case the Circuit Court of the United States for the District of Kansas was not the proper district, therefore this case was not removable thereto.

It may be said in this case that this suit might have been maintained in the United States Circuit Court of Kansas, if the parties had consented thereto. While consent may be given to jurisdiction in a federal court over a cause instituted therein, where the case is one arising between citizens of different states, and is therefore cognizable in some federal court, yet such consent cannot give jurisdiction in a case cognizable by removal. The reason of this is plain. The second and third sections of the Judiciary Act of 1887 and 1888 only gives the right of removal where the removal may be taken "to the Circuit Court of the United States for the proper district" provided by the terms of Sec. 1 of said Act. By Sec. 1 of said Act, jurisdiction in this case was not conferred on the Circuit Court of the United States for the District of Kansas, but on one of the Circuit Courts of the United States for the District of Missouri or New Jersey. And since, therefore, by said Sec. 1 of said Act, jurisdiction in this action was originally conferred on either the Circuit Court of the United States of Missouri or of New Jersey, and since by Sec. 2 of said Act the removal must be taken to a court in which by said Sec. 1 the case could have been instituted, and since this case could not have been instituted in the

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Circuit Court of the United States for the district of Kansas, it was not removable to that court.

Removals of causes do not in any case depend upon the consent of parties. A removal, in order to be sustained, always depends upon the state of the record in the state court at the time the removal is taken. The question of waiver has, so far as we know, arisen only in original cases brought in federal circuit courts where the cases were between citizens of different states and involved the requisite amounts of over $2,000, and were therefore cognizable in some federal circuit court, but were brought in the federal circuit court of the wrong district. In those cases, since the requisite jurisdictional facts of diversity of citizenship and amount involved exist, it is the rule as made by the decisions of this court, that where those facts appear from the record, the case where brought in the wrong district may, nevertheless, remain and be prosecuted there if the parties waive the bringing of the suit in the wrong district. These cases always presuppose that some federal circuit court has jurisdiction over the case and that the suit has been brought in the wrong district, but that the parties may waive the mere question of the place where the suit is brought. But this proposition of waiver has never been applied to removal cases to federal from state courts. Under the removal provisions of the Acts of 1887 and 1888, cases can only be removed to the one federal circuit court sitting in the district of the state in whose court the suit is pending, and then only when the plaintiff in such suit is a citizen of that state and the defendant is a citizen of some other state.

In the suit at bar, it might have been brought originally by the plaintiff in a federal circuit court, either in Missouri or New Jersey, of which state these parties were and are citizens, but it could not under any of the removal acts be removed to either of those federal circuit courts from the District Court of Wyandotte County, Kansas, and it could not be removed to the federal circuit court of Kansas unless the removal acts warranted such removal

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The removal of the case to the federal circuit court of Kansas was not warranted because plaintiff was not a citizen of that state.

In removal cases four jurisdictional facts are necessary to confer jurisdiction on the federal circuit court, and those four facts must all exist when the removal is taken and appear from the removal petition. Those facts are: First, diversity of citizenship; second, the amount involved must be over $2,000; third, the plaintiff must be a citizen of the state in whose court he brings the suit; fourth, the defendant, who alone can remove the case, must be a citizen of some other state. If any one of these four jurisdictional facts does not exist, the case is not removable and jurisdiction in the federal court does not arise. Even if the removal petition be regarded as process to remove the case, as has sometimes been said, still it is not the removal petition, but the above jurisdictional facts to be made to appear by that petition which confer jurisdiction on the federal court.

In this case, jurisdiction in the Kansas federal circuit court could not and did not exist, because plaintiff was not a citizen of Kansas, which fact appears from the removal petition filed by defendant (p. 8, Record).

This question of waiver does not arise except in cases originally brought and cognizable in a certain class of courts, state or federal, and where a suit is brought in one of those courts, but in the wrong district or county. This question of waiver cannot be applied to removal cases, because by the removal acts a suit is only removable from a state court to one particular federal court, and if the suit in question is not removable by the removal acts to that court, on the facts as they exist at the time of the removal, jurisdiction by removal does not exist and cannot be conferred, either by subsequent waiver or consent. The questions of jurisdiction in federal circuit courts in original and removal cases arise from different federal statutes, containing unlike provisions and founded on varying considerations, and reasons. The question of jurisdiction in a removal cause must always be tried and determined

by the state of the record, including the removal petition, as that record exists at the time of the filing of the removal petition. Subsequent consent or waiver cannot confer jurisdiction if the jurisdiction as shown by the removal petition does not exist.

The jurisdiction of the United States Circuit Court in this cause depends, therefore, upon the state of the record in the District Court of Wyandotte County as that record was made and existed at the time of and by the filing of the removal petition. Tried by that test, nothing can be more certain than that the Circuit Court of the United States for the district of Kansas did not have jurisdiction in this cause.

No motion to remand, or point upon the want of jurisdiction, was made by petitioner either in the United States Circuit Court or in the Court of Appeals, nor were they necessary. The reason for this, if reason could be considered necessary, is that the decision of the court in the Wisner case, 213 U. S., 449, was given December 10, 1906, which was long after the trial and judgment in the suit at bar in the United States Circuit Court for the District of Kansas, and after the removal of this cause from the United States Circuit Court for the District of Kansas to the United States Circuit Court of Appeals for the Eighth Circuit, and after, indeed, the submission of this cause to the Circuit Court of Appeals for its decision. The trial of this cause for the United States Circuit Court for the District of Kansas, was December 2, 1905. (P. 20, Rec.) The transcript in this case was filed in the Circuit Court of Appeals April 6, 1906. The briefs of counsel were printed and filed and the cause argued in the Circuit Court of Appeals, in December, 1906. The decision of this court in the Wisner case was given December 10, 1906, but it was first published February 1, 1907, in the Supreme Court Reporter of that date, of Vol. 27, U. S. Supreme Court Reporter, Feb. 12, 1907, page 150. This was the first publication of the decision of the court in the Wisner case, and as is shown by the foregoing dates, this publication of the decision of the court in the Wisner case

was long after the trial of this case in the United States Circuit Court for the District of Kansas, and after the argument and submission of this cause to the Circuit Court of Appeals for its decision. This explains why this point of jurisdiction was not raised in either the trial court or the Court of Appeals. However, we submit that the failure of the petitioner to raise the question of jurisdiction, either in the United States Circuit Court or Court of Appeals, does not have the effect of conferring jurisdiction on those courts. This proposition is settled by the long course of decisions of this court from the time of the Judiciary Act of 1789 until the creation of the Circuit Court of Appeals in 1891. During that period, of one hundred years, this court gave many opinions in cases which went there from the circuit courts by writs of error and appeal, reversing those judgments for want of jurisdiction. And the reports of those cases will show that in many of them this court reversed for want of jurisdiction where no point as to jurisdiction was made, either in the circuit courts or in this court. In some of those cases this court, acting upon its own motion, without any suggestion from counsel, adjudged a want of jurisdiction and reversed the judgments of the circuit courts and remanded the causes with direction to dismiss for want of jurisdiction, if the cases were originally brought there, or to remand to the state courts where the cases had been removed.

Thus, in *Parker* v. *Ormsby*, 141 U. S., 81, this court decided that a party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that court so as to prevent its being passed upon here.

See also *Mattingly* v. *R. R. Co.*, 158 U. S., 53. In that case this court held that the removal petition therein was insufficient to confer jurisdiction on the federal circuit court; that when the record fails to affirmatively show jurisdiction, this court must take notice of the defect. And it was further held that as that case was improperly removed from the state court, this court reversed and remanded the cause with directions to remand it to the state court.

We submit that further citation of authorities on this point so familiar to the court, is unnecessary.

The decisions of this court on this point all proceed upon the theory that the decree of a federal circuit court without jurisdiction is erroneous and should be reversed on writ of error or appeal, although the point of want of jurisdiction was not made by the parties, either in the trial court or in this court, and under the practice of this court in causes removable thereto by writs of error and appeals from the circuit courts from 1789 to 1891 it was the universal practice and rule of this court to reverse and remand where the record failed to show jurisdiction.

We submit that the same rule should obtain in this court now under the writ of *certiorari*.

The writ of *certiorari* which we now apply for, is the same in its effect as a writ of error. The only difference between the two writs is that a writ of error is grantable as a matter of course, while a writ of *certiorari* can only be granted by this court on application thereto for that purpose, and then in the discretion of the court. And if in this case the judgment would, as we have seen, have been reversed because of the want of jurisdiction of the trial court, if this case had been removed to this court by writ of error, then we submit that since this case is only cognizable here by the writ of *certiorari* and not by the writ of error, therefore this court should grant the writ of *certiorari* in this case. And this is precisely what was done by this court in the case of *Cochran* v. *Montgomery Co.*, 199 U. S., 260. In that case, this court held that the suit was one over which neither the Circuit Court of the United States for the District of Alabama nor the United States Circuit Court of Appeals of that circuit had jurisdiction, because that case was not removable to the Circuit Court of the United States for the District of Alabama from the Alabama state court, and because of the error of the United States Circuit Court and the Court of Appeals in that case in entertaining jurisdiction, this court granted the writ of *certiorari* to correct that error, and on that

writ reversed the judgments of those two courts and remanded the case to the Circuit Court of the United States with directions to remand the case to the state court.

It seems to us the decision of the court in that case is a precise authority for the granting of the *certiorari* in this case. We submit, therefore, that the court in this case grant a writ of *certiorari* and upon the hearing of the case that the court adjudge that this case never became cognizable in the trial Federal Circuit Court, and that, therefore, the judgments of said Circuit Court and of the Court of Appeals should be reversed and the case remanded to the Circuit Court of the United States for the District of Kansas, with instructions to remand the case to the District Court of Wyandotte County, Kansas. If, however, this court should be of opinion on the hearing of this case that this point of jurisdiction is not sustained, then we desire to submit that on the merits of the cause, the decision of the Circuit Court of Appeals on the important question involved in this case is opposed to the decisions of the other circuit courts of appeal of the United States on the same question, and is likewise opposed to the general current of authority in the state courts. On this ground also we ask the issuance of the writ of *certiorari*. We will now set out the second ground for this application.

II.

The second ground upon which this petition for a writ of *certiorari* is based is that in this case a rule of law has been declared in the 8th Circuit by the United States Circuit Court of Appeals for that circuit that has never been announced by any other court, and that is in direct conflict with and cannot be reconciled with the decisions on the same point by the United States Circuit Courts of Appeal in the other circuits, and by the State Supreme Courts of the different states, and that by reason of this decision

a different rule of law obtains in the 8th Circuit than that declared in the 2nd, 6th and 7th Circuits of United States Courts of Appeal. And when a conflict of decisions arises between the various circuit courts of appeal, the method provided for establishing one uniform rule of law is for this court to bring one of the conflicting cases before it and determine which rule should be followed in all of the circuits.

Since this case involves an important question on the law of master and servant that is not local in its application, but affects not only ten million or more employes in the country, but also a vast number of employers of men in every state and territory, this case should be brought before the Supreme Court of the United States, so that it may be determined whether the rule declared by this decision in the 8th Circuit, or the different rule which has been declared as the law in the 2nd, 6th and 7th Circuits, should be adopted as the one true rule of law.

This is an action at law to recover $15,000 damages for personal injuries to petitioner, growing out of the following state of facts (pages 5 and 15, Record):

In the fall of 1904 the Proctor & Gamble Company, as owner, was having constructed for it a building to be used for a soap factory in Kansas City, Kansas. Respondent, Westinghouse, Church, Kerr & Company, as contractors, constructed said building for the Proctor & Gamble Company under a contract, one Clemm being in charge of its construction as general superintendent, and he employed petitioner as a foreman of bricklayers; the building was about 130 or 140 feet long by 50 feet wide; the building had a steel frame work which was covered with brick, the steel work forming supports for the building and the brick work being built over it.

At the time plaintiff was injured the steel work had been constructed to a height of forty-two feet from the ground to a point where the top or roof of coal bunkers was being constructed. (Rec., 39, 51.) The brick walls were built up to varying heights around the steel work. (Rec., 24 and 25.).

A stiff leg derrick was constructed and was placed on top of the steel beams that were to form the roof of the coal bunkers. This derrick at the time of plaintiff's injury was at the northeast corner of the building, about twelve feet south of the north wall and an equal distance west of the east wall of the building. There were some boards lying on top of the steel beams back from the wall, probably twelve feet. Between these boards and the north wall of the building there was an open space which was not floored. (Rec., 51.).

There was a gang of laborers on top of the building doing some concreting. (Rec., 41.). They were some distance back from the north wall of the building. (Rec., 46.).

The derrick was being used to bring up material from the ground for concreting. There was an engine on the ground north of the building. A rope was run from the engine through the building up to the derrick and above the mast to its top and to the end of the boom through pulleys and attached to a large bucket or square box. The bucket was filled with concrete and raised by the engine to a point higher than the top of the coal bunkers. It was then pulled in southwardly over the building by a tag line attached to the end of the boom. There was no particular person or persons charged with the operation of the derrick, but some of the concrete laborers on the building pulled the boom in with a rope or tag-line so that it would swing around to where the concrete men were working. The bottom of the bucket or box was hung on hinges and fastened with a clasp and pin. The laborers would remove the pin, the bottom would fall down and the material would drop out of the box. When the box was emptied, several laborers would get behind the bucket and would give it a shove and give it sufficient momentum to carry it by one continuous movement out over the building, the open space between the derrick and the wall, and out over the wall of the building, so that the bucket could go down on the outside. The derrick was twelve or fifteen feet from the wall and the concrete was dumped back

of the derrick. When the bucket was sent out by this shove it went from the point where the concrete men were working over this open space described as being twelve or fifteen feet wide, and on beyond the wall so that it would swing clear of the wall on the outside. The shove was given with sufficient force to send the bucket from twenty to twenty-five feet. There was only one rope supplied by defendant with which to pull the boom and the bucket in over the top of the building. One end of this rope or tag line was attached to the boom and the other lay back on the floor where the concrete men were at work. This one rope or tag line was the only method provided by defendant for controlling the movement of the derrick or boom. There was no double set of ropes attached to the boom on opposite sides thereof and no arm or lever on the mast or the boom with which to operate it, and none of the appliances with which it is usual and customary to control the action and movements of the boom of derricks. There was no way of controlling the boom of the derrick after the bucket was once given a shove. If anybody got in the way of the bucket there was no way of stopping it after the workmen let go of it. (Rec., 51, 52 and 53.) Since the bucket was moved under and with the boom above it, and since the boom moved in a circle, the bucket when thus pushed moved over the building in a circle and not in a direct line, and nothing was done to indicate the course of that circular line. Defendant did not provide any system of signals for the operation of the derrick, and no provision of any kind was made by defendant for warning employes of any of the other gangs on the building that the bucket was about to be moved across the top of the building, and plaintiff was not warned. No particular person was charged with the duty of operating the derrick, but its operation was left to the concrete laborers who were engrossed with their other duties. This derrick had been used exclusively by the concrete men and had not been used by any of the force of bricklayers before plaintiff was injured (Rec., 37, 40, 41 and 51), and had remained in one posi-

tion from the time it was erected until long after plaintiff was injured.

Plaintiff was foreman of the bricklayers employed on the job and was in no way connected with the concrete men; he had been working on the brick work below the top of this steel structure. (Rec., 25.) Prior to the time that he was injured, plaintiff had been on top of the building twice. The first time he was on the west end of the building probably seventy-five or eighty feet from the derrick, and the derrick was not in operation on that day. The second time plaintiff was there he was at the east end of the building and the derrick was not in operation at that time. (Rec., 37.) Plaintiff knew a derrick was being operated on top of the building, but did not know the negligent method in which it was equipped (Rec., 38).

He did not know that there was no system of signals in use concerning the movement of the derrick or bucket; he did not know that there were not ropes on the point of the boom of the derrick to control its movements; neither did he know that there was not a lever on the mast of the derrick by which its movements could be controlled, nor did he know that there was no employee of the defendant stationed to control the movements of the derrick or warn persons of its movements.

Plaintiff in the performance of his duty went to the top of the building to direct some laborers in building a scaffold for the bricklayers, and was standing on a board that was lying right at the north wall and was looking north. The derrick was to the south of him and at his back. (Rec., 25 and 26.) The bucket was between petitioner Kreigh and the laborers who pushed it. (Rec., 43.) When this bucket was pushed around by a shove it struck him and knocked him from the building. (Rec., 25, 39 and 40.) No signal was given that the bucket was about to be moved, and plaintiff was not warned that he was in danger, or that the bucket was about to be moved. (Rec., 26, 41, 42.) Plaintiff was thrown to the ground, a distance of forty-two feet, and was

very severely injured. (Rec., 26, 27, 28 and 29.) The negligence charged in plaintiff's amended petition was that:

"1. The defendants were careless and negligent in furnishing and operating a defective, improper and unsafe derrick to raise, move and lower said tub or bucket:

(a) Said derrick was so constructed and operated that there were no means of moving the arm thereof, and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employees of the defendants violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building, and also move with it said arm.

(b) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

(c) The ropes and pulleys on said derrick were defective, insecure and improperly arranged and used.

2. The defendants were careless and negligent in causing and allowing said bucket to be violently pushed and swung against the plaintiff without notice or warning to him.

3. The defendants were careless and negligent in failing to supply and use a system of signals or warnings to notify persons on the building when the derrick, tub or bucket were to be moved, raised or lowered." (Rec., 14-15.)

At the close of plaintiff's evidence the trial court sustained a demurrer to the evidence, and directed a verdict for the defendant, to which plaintiff duly excepted. Said verdict was given and final judgment entered for defendant in the trial court.

On February 20, 1906, and within the time allowed and extended by the defendant, petitioner filed his bill of exceptions in the case, which was on said date by the court allowed and signed, and which extends from page 21 to page 89 of the printed record.

The amended petition in the case may be found from page 13 to page 19 of the record.

A history of the trial of the case may be found from page 23 to page 88 of the record.

Within due time the case was duly removed by writ of error, citation and by filing an assignment of error to the United States Circuit Court of Appeals for the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1906, and was decided by that court March 6, 1907, by an affirmance of the judgment of the Circuit Court. *Kreigh* v. *Westinghouse, Church, Kerr and Company,* 152 Fed., 120.

Said petitioner further shows to the court as will appear from the opinion of said Circuit Court of Appeals (152 Fed., 120,) that said judgment of affirmance by said court was based on the theory of law, declared in its opinion, that where the plan of construction and necessary method of operation of an appliance created a danger, and when such appliance was first installed there may have been no apparent occasion for other employes at work on the building to go to the place of danger at that time, yet at that time it was apparent and certain that at some time while the appliance should be in use, employes would necessarily go in the path of this danger in the performance of their duties, the master is not liable for the injury of a servant whose duty called him thereto. The reason given by the Court of Appeals for this rule is, that while the danger existed from the very start, and the appliance that caused plaintiff's injury was not moved and its character remained the same from the day it was installed to the day the work for which it was provided was finished, the progress of the work changed this particular employe's place of work and took him in the path of, to him, an unknown danger, ready and waiting for the time he should come. The United States Circuit Court of Appeals misstates the rule and its reason when it says: "The rule of safe place is inapplicable to this case," and thus states its rule which is not applicable to the case:

"The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety as the work progresses, is the duty of the servants to whom the work is intrusted, and it is not the duty of the master."

152 Fed., l. c., 123.

The effect of this decision is that the master is liable only for

a defect in material or workmanship of an appliance, and that the servants alone are responsible for an improper plan of construction of an appliance, and for the lack of the usual equipment in general use on such appliances that make the method of operation dangerous and make it cause injury to another employe, and this, although the servant injured had no part whatever in constructing the appliance, and had no knowledge of the plan of construction or the method of operation made necessary thereby.

While this court will not consider the mere application of settled principles of law to the facts peculiar to a particular case the importance of which is limited to the litigants engaged in it or to a small class of litigants, yet rules of law can only be evolved from facts and the far-reaching effect of this decision and its widespread importance can be appreciated only by a consideration of the facts and the declarations of principles of law made by the Court of Appeals in connection with them. The application of the law to the facts of this case made by that court establishes a rule of law at variance with that in effect in every other jurisdiction so far as we know.

Defendant was constructing a large factory building. It placed a derrick on some steel cross-beams over the top of the coal bunkers for use by a party of laborers under a foreman engaged in covering those coal bunkers with concrete. The boom of the derrick was swung out over the north wall of the building above the concrete materials on the ground below, a large bucket or tub was filled with this material and was raised to the top of the coal bunkers by means of a rope attached to it and run through pulleys to the end of the boom of this derrick, thence to the top of the mast, and down the mast and through the building to an engine, on the ground near the concrete materials, which supplied the power for raising the bucket. When this bucket was raised to the top of the coal bunkers it was pulled in by a single tag line and dumped, and when they desired to send this bucket out over the wall again several of the concrete men got behind it and by

the impetus of a shove sent the bucket and the boom of the derrick with it flying over the building and over the wall. Plaintiff had no part in the construction of the derrick, it was erected for and was being used by the concrete men engaged in a different department of work from plaintiff, who was the foreman of the bricklayers. Neither plaintiff nor his men had ever used this derrick before plaintiff was injured. The derrick was not moved nor was its condition or method of operation changed after it was installed for this work. Before the day of his injury, plaintiff's work had been below the top of the coal bunkers, but day by day the brick work approached the top of the coal bunkers until on this day it was built within a few feet of the top of these cross-beams on which the derrick rested. It then became necessary to place new scaffolding for the bricklayers that they might continue their work. Plaintiff in the performance of his duty had boards placed on top of the cross-beams along the north wall so that he might walk on them along the north wall of the building and direct the construction of the scaffolds, he got on those boards for that purpose and without any warning to him the bucket was shoved out and struck him and knocked him off the building to the ground over forty feet below and he was seriously injured. While this heavy bucket had been sent flying through the air over the top of this building every day the derrick was operated, the course the bucket would take each time it was pushed out over the building was in no way indicated, no method of controlling the derrick was adopted though two methods by which the bucket could be moved slowly and remain in perfect control of its operators were and long had been in common use on such derricks, and on such buildings, no precautions were taken to avoid danger, no special person was charged with the duty of operating the derrick, no system of signals or warnings was adopted or put in use to notify employes of other gangs on the building, no provision for warning of the danger was made, no warning was given. Although when the derrick was installed plaintiff's duties did not require him at that time to

go along the north wall of the building on the top of these cross-beams, yet it was at that time intended by defendant that the derrick should remain in this one place and that its condition should remain unchanged until the concrete work over the coal bunkers should be finished, and it knew that before it was finished and while the derrick was still in use the brickwork would be built to this level and that the bricklayers would be along this north wall at the top of these cross-beams in the pursuit of their duties. Moreover, the daily progress of the brickwork notified defendant's superintendent, who had charge of all of the work, that the time had come when these brick men would be in peril from this dangerous appliance, the progress of the brickwork notified him that on this day of the injury plaintiff was exposed to this peril arising from the doing of other extraneous work by defendant's servants distinct and separate from the work in which plaintiff was engaged. These facts were overlooked by the learned Court of Appeals when it said in its opinion in this case that, "no one could have reasonably anticipated that he would *suddenly* rise above the roof and station himself upon the plank in the path of the bucket without notice to its operators and without watching for its approach." We submit that the court of appeals conceived plaintiff's action to be based on the negligence of these operators in not seeing plaintiff and avoiding the injury, when the negligence charged in the petition is a failure of defendant to furnish adequate appliances and protection. Plaintiff's appearance on top of the building may have been sudden to these concrete men engrossed in their other duties, but it was not sudden to Mr. Clem, the general superintendent of all of the work and the *alter ego* of the defendant. The words of the court in *Grace Hyde Co.* v. *Kennedy* are applicable here. The court said:

"The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or ser-

vants to do the things which will obviously prevent the known original danger." (*Grace Hyde Co.* v. *Kennedy*, 99 Fed. l. c., 682; 40 C. C. A., 69.)

Plaintiff did not know of this danger, he knew there was a derrick on the building, but he did not know its plan of construction or its necessary and required method of operation, there was nothing to indicate to him that he was in a place of danger, the very first time his duty took him to the top of these cross-beams along the wall where he was required to work he was knocked off of the building and very severely injured, yet the Court of Appeals said that it was plaintiff's duty to notify the concrete men that he was going to a place beset with dangers unsuspected by plaintiff and dangers that prudence on his part did not require him to know, and that plaintiff should have notified these men not to knock him off, when there was nothing to indicate to him that they were about to knock him off, which is evidenced by the following language in its opinion, "There was no evidence that he attempted to notify the roofers of his presence."

On this state of facts the Court of Appeals in its opinion in this case held as a rule of law that, "the defendant was free from any act of omission from which the accident could reasonably have been anticipated, or from which it would have resulted had it not been for the subsequent interposition of other human agencies," and that the case should not be submitted to a jury.

So far as we are aware, the opinion in this case is the first enunciation by any court in this county of the rule of a safe place to work declared in the decision. The views expressed in this opinion were proposed in a dissenting opinion by the learned judge who wrote the opinion in the case at bar, in the case of *Austin Mfg. Co.* v. *Johnson*, 89 Fed., 677, 32 C. C. A. Rep., 309, but Judges Shiras and Thayer in the majority opinion of the court declared a different rule of law and said:

"If a derrick had been used to swing the beams into position while they were being bolted together, there could be no question

that it would be an appliance, within the rule that requires of the master due care to supply proper machinery and appliances for the performance of the work in hand."

The decision in the case at bar is in direct and irreconcilable conflict with the *Austin Mfg Co.* case just cited in the 8th circuit, and with the decision in *Highland Boy Gold Mining and Investment Co.* v. *Pouch* (124 Fed., 148) in the 8th circuit in which Judge Sanborn dissented from the opinion of the court by Judge Thayer, concurred in by Judge Caldwell.

It is in conflict with the law as declared by the U. S. Circuit Court of Appeals in the 2nd Circuit. In the case of *Grace & Hyde Co.* v. *Kennedy,* 99 Fed., 679, 40 C. C. A., 69, that court says:

"The defendant insists that the rule of law which directs the master to provide his servant 'with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged' (*Railroad Co.* v. *Peterson,* 162 U. S., 346, 353; 16 Sup. Ct., 843; 40 L. Ed., 944), is inapplicable, because the street was a safe place, and the rule as to safe places does not apply when the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done. The argument rests upon the incorrect assumption that the place originally furnished was safe. The place was an avenue extensively used for travel, in which a substantial shed was to be erected at night by the use of derricks secured by ropes stretching somewhere in the avenue. It was eminently unsafe unless protected either by danger signals or watchmen. It is said, however, that when the workmen began work sufficient appliances in the way of lamps were furnished, and that it became unsafe by the way in which the work was done. This subject was considered by this court in *Baird* v. *Reilly,* 35 C. C. A., 78, 92 Fed., 884, in which, after saying that an employer cannot escape responsibility for injuries to an employe by alleged failure to make the working place reasonably safe by proof that he had furnished a competent foreman with necessary appliances and needful instructions, the court said:

'When, however, it appears that the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated by exigencies, created in carrying on the details of the work, or by the neglect of a fellow servant, a different rule is applicable.'

"The facts of the case do not bring it within the exceptions. The place could not be reasonably safe when the workmen began their night's work unless an adequate system was adopted for their protection against dangers which were easily to be anticipated; neither did danger spring out of sudden exigencies, or sudden neglect or mistake of a foreman or workman. The negligence, if it existed, arose from the insufficiency of the means for the protection of the workmen which were originally adopted. *Mather* v. *Rillston,* 156 U. S., 391, 15 Sup. Ct., 464, 39 L. Ed., 464.

"The defendant's assignments of error seek to introduce into the case the doctrine of non-liability for an injury caused by a co-servant, and it is urged that the danger was created by the workmen themselves; for it did not appear that there was a necessity for tying the guy lines on the other side of the street, and that occasion for warning or signals arose only in consequence of the act of the men in thus extending the ropes. The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servant to do the things which will obviously prevent the known original danger. *Howard* v. *Railway Co.* (C. C.) 26 Fed., 837; *Railroad Co.* v. *Peterson, supra.* In regard to the fact of the insufficiency of the means of protection, competent testimony was introduced to show that the usual practice with respect to guarding obstructions at night in the street where men are at work is to place the red lamps upon the obstructions, or to employ a watchman for the purpose of warning against the danger. *Baird* v. *Reilly, supra.* The defendant had provided four red lanterns. Two of these had been broken before the night of the accident, and the other two were on that night placed one upon each end of the beam on the street which has been spoken of, but there were none upon the guys of the injured derrick. There was also testimony upon the part of the plaintiff that no person had been specially designated as a watchman to give warning to drivers of vehicles, and upon the part of the defendant that the foreman and another person attended to this service in addition to their other duties. The conflict of evidence on the subject was sufficient to compel the submission of the question to the jury.

"The subject which is contained in the defendant's assignment of error that the plaintiff assumed the risk of his position and of the conditions as they existed was fully considered in *Railway Co.* v. *Archibald,* 170 U. S., 665, 18 Sup. Ct., 777, 42 L. Ed., 1188, and it is sufficient to say that the plaintiff did not assume the risk of the employer's neglect to furnish a reasonably safe system of

protection against the danger from injury by passing vehicles, and that there is no adequate evidence that he continued to remain at work with the knowledge of the insufficiency of the protection which was actually furnished. The judgment is affirmed with costs." (*Grace & Hyde Co.* v. *Kennedy*, 40 C. C. A., 69.)

And the same court in *Western Electric Co.* v. *Hanselman*, 136 Fed., 564, 69 C. C. A. Rep., 346, said:

"But independently of these considerations, the case presented is one where a servant is directed to work in a place safe in itself, but where by reason of other and independent work pertaining to the business of a common master, the servant is exposed to perils arising from the doing of such distinct and independent work. The authorities are irreconcilably in conflict as to the liability of an employer when by his direction or by an arrangement between employes engaged in a common employment, one of the employes undertakes to warn another of the perils arising in the course of said employment, due to the performance of the common work. In the case at bar, however, the facts call for the application either of the well-settled rule that a master is liable when he either fails to provide for giving warning of danger or intrusts the duty of giving such warning to an employe so engrossed with other duties that he could not properly and efficiently give the necessary warning, or of the other equally well-settled rule, established by repeated decisions in other jurisdictions and in this circuit, that when the perils to be apprehended arise either from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the particular servant is engaged, the master is bound to employ the necessary means to give timely warning of such danger, and that he cannot delegate his duty to any other person, so as to relieve him from liability for the negligent failure to give such warning."

Western Electric Co. v. *Hanselmann*, 136 Fed., 566, 69 C. C. A. Rep., 346.

And in the *Hanselmann* case the court further quotes with approval the following from *Grace & Hyde Co.* v. *Kennedy, supra*:

"The court below distinguished between the cases where the progress of the work itself affected the question of safety or caused the peril, and those where the accident occurred by reason of a failure to give warning of a danger with which the work in which plaintiff was engaged had nothing to do. This court in reviewing the decision below affirmed the distinction."

This decision is also in conflict with the law as declared by the Circuit Court of Appeals in the 6th Circuit in *National Refining Co.* v. *Willis,* 143 Fed., 107, 74 C. C. A., 301, in which the court says:

"It is true that, if the scaffold was constructed for the sole purpose of holding the workmen and their tools, and during the progress of the work, because of an unexpected emergency, not within reasonable contemplation, was improperly used as a foundation for the jack and its pressure, the negligence consisting solely in such use, no recovery could be had; for the negligence would be that of a fellow servant. In other words, if the scaffold was fit for the intended use, and was negligently used for an improper and unanticipated one, the company would not be liable. But, on the other hand, if the scaffold was erected not only for the purpose of holding the workmen and their tools, but also of serving as a foundation for the jack and its pressure, and through the negligence of Hummel it was not made strong enough, and broke, the company would be liable; for the duty to make it strong enough for both purposes, and reasonably safe, not only as a place to work, but as an appliance to work with, in erecting the roof, would be a positive one which could not be delegated, so as to relieve the master from responsibility."

It is also in conflict with the rule of law declared in the 7th Circuit in *Thompson-Starrett Co.* v. *Fitzgerald,* 149 Fed., 721, 79 C. C. A. Rep., 427, in which the court said:

"On this basis that defendant, as master, had undertaken to provide its servant a safe appliance in the performance of his work, a finding of negligence was justified by the foregoing view of the evidence.

"As the extending of the outer planks beyond the edge of the small jog in the beams was not necessarily apparent to a laborer who went on the platform in the performance of his work, there was no error in submitting the question of contributory negligence to the jury. And as there was no evidence that plaintiff had notice or knowledge of the defect, the risk was not assumed.

"It is further contended under the same assignment that the alleged negligence was not that of defendant, but of fellow servants of plaintiff. If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the

master; but if it is the duty of a body of servants to construct a staging as an incident of the work upon which they are employed in common, the master performs his full duty by providing suitable and sufficient materials and men, and he cannot be held by one of the body for the negligence of any of the others. *Phoenix Bridge Company* v. *Castleberry*, 131 Fed., 175, 65 C. C. A., 481; *National Refining Company* v. *Willis*, (C. C. A.) 143 Fed., 107. There was evidence that the staging or platform in question was built by a scaffold gang under, and according to the direction of a scaffold foreman, who hired men for that purpose; that this foreman was also the foreman of the common laborers of whom plaintiff was one; and that he 'took any of the laborers who happened to be around to build the scaffolds.' But plaintiff did not take part in building this platform, nor was it shown that he had ever performed or been called on to perform such work. Indeed, he testified that he did not know that his foreman was also the foreman of the scaffold gang. From this evidence it might be inferred that scaffold building was a separate branch of work, not within the scope of plaintiff's employment. And conceding that a contrary inference might also be drawn, the question was one for the jury."

This decision is also in conflict with the decision of the state courts. Among the multitude of decisions of the state courts that might be cited, is the decision in the case of *McCauley* v. *Norcross et al.*, 30 Northeastern, 464, in which the Supreme Court of Massachusetts says:

"If the beams were so left that one of them would be liable as a natural consequence from said intervening cause or agency to be so moved that it might fall through the floor, the fact that an intervening act or agency occurred which directly produced the injurious result would not necessarily exonerate the defendant from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen, and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were negligently left near the hole in the floor where they were likely or liable to be toppled over, so that one of them might fall through the hole, and thus injure some one below, and that this was the proximate cause of plaintiff's injury, although some careless person came along and toppled them over."

Another of these decisions of the State court is that in *Felice*

v. *New York Central and H. R. Railroad Company*, 14 N. Y. Appellate Division, 345, in which the court says:

"The relations between a master and servant and the duty which the master owes to his servant, under the circumstances in which this man was engaged, are not at all in dispute. It is the duty of the master to use reasonable care to provide for the servant, so far as the work at which he is engaged will permit, a reasonably safe and proper place in which to do his work, and to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them, or to guard himself against them. (*Pantzar* v. *The Tilly Foster Iron Min. Co.*, 99 N. Y., 368; *McGovern* v. *Central Vermont* R. R., 123, *id.* 280.) Just how that duty should be performed in any given case cannot be determined as a matter of law. It may be that, under certain circumstances, the work is such and so done as to require the master to make rules for the conduct of the employes, so that they may be protected from the dangers which approach them. (*Eastwood* v. *Retsof Mfg. Co.*, 86 Hun., 91.) It may be that some other means may properly be employed to give the warning he is entitled to; but whatever means are employed, it is the duty of the master to employ them, and that duty cannot be delegated to any other person; but in whatever way it may be exercised it remains the duty of the master, and the person appointed to perform it is the *alter ego* of the master, for whose negligence the master is liable. (*Bushby* v. *N. Y. L. E. & W. R. Co.*, 107 N. Y., 374; *Pantzar* v. *Tilly Foster Iron Mining Co.*, *supra.*) As to the performance of that kind of duty, the person intrusted with it, if anybody is so intrusted, is not a co-servant of another employe, but he is, for that purpose, the master, and his act and his neglect is the act and neglect of the master himself.

"The jury cannot say what means of warning should be adopted. The question for them is simply whether the means which were adopted to give warning in the particular case were sufficient for the purpose for which they were intended. (*Dyer* v. *Erie Ry. Co.*, 71 N. Y., 228.) In this case the evidence shows that it was not the duty of any one man of those in the tunnel to look out for the safety of the rest. Each man was required to look out for himself. That being so, it was clearly the duty of the defendant to give such warning of the approach of trains as would permit each man, looking out for himself, to become aware of their approach in time to avoid them."

The decision in this case is also in conflict with that in case of *Swoboda* v. *Ward,* 40 Mich., 420, in which the Supreme Court of Michigan said:

"A person when employed and instructed to commence work at a particular place, as for instance in this case in a mill, is under no obligation, in order to protect himself from the charge of contributory negligence, to first go all through the building, and make himself familiar with each piece of machinery and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for him that in entering upon the active discharge of the duties assigned to him, he ascertains what he is expected to do, and the danger directly connected therewith, and he has a right to assume that in the performance of that particular duty, reasonable facilities therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers."

In the case of *Lang* v. *Terry,* 163 Mass., 138, plaintiff recovered for negligence of defendant in using a derrick without a guide rope attached to the load. The derrick in that case was thus described by the court:

"At the time of the accident the plaintiff was engaged in the performance of his duty, putting some boards over an iron casting on the deck, near the bow of the boat in accordance with the direction of the captain. He was struck by a swinging spile, which was hoisted by a derrick and steam hoisting engine for the purpose of being transferred from a steam barge to the barge on which he was working. The spile was hoisted and swung around without the use of a guide rope. It appears that he could have seen the spile before it struck him if he had been looking for it, and he testified that he knew they were going to lift the timber when they got ready and everybody was out of the way; but he did not suppose they were ready to start when they did. There was evidence that a warning was given him to look out just as he was struck, but not in time to enable him to avoid the swinging timber.

We are of opinion that it was a question of fact for the jury on the evidence, whether the plaintiff had such reason to expect the hoisting of the spile without warning, and the swinging of the spile in a dangerous way, as to require him in the exercise of ordinary care to watch the operation of the hoisting engine and look out for himself. They might think that he had reason to expect that the spile would not be hoisted while he was at work over the grating without first giving him warning, or that it would not swing in such a way as to strike him."

A multitude of other state court decisions to the same effect might be cited but we suppose it to be unnecessary.

At this point petitioner in presenting this application calls the court's attention to what is said by the learned Court of Appeals in its opinion in this case, and we think the error of that opinion will appear from a review of the same. In that opinion the learned Court of Appeals said:

"Neither he (plaintiff) nor any one except the roofers, had been at work or moving about upon the top of the building for several days, and no one could have reasonably anticipated that he would suddenly rise above the roof and station himself upon the plank in the path of the bucket, without notice to its operators and without watching for its approach. His injury was not the natural or probable result of, and it could not have been anticipated from, the lack of a code of signals, when there had been no one on the building to signal to for days; nor from the lack of a lever on the derrick with which to swing the boom, nor of a guy rope on the north side to draw it across the wall. As the accident could not have been foreseen to be the natural or probable result of the failure to provide signals, lever or guy rope, the defendant owed the plaintiff no duty to do so and was guilty of no actionable negligence."

In the foregoing portion of the opinion of the learned Court of Appeals, we think there is manifest error. The learned court erred in the conclusion stated, that the defendant could not anticipate from the undisputed facts of the case that the plaintiff might be where he was at the time of the injury. The learned Court of Appeals, in more than one place in its opinion, concedes that if the defendant should have anticipated that the plaintiff, in the discharge of his duty during the progress of the work, might come and be on the roof where he was struck and injured, then it was the defendant's duty to have provided means for the protection of plaintiff against the danger which resulted in the injury. Thus, in the opinion of the learned Circuit Court of Appeals, at another place, that court said:

"It might have been the duty of defendant to establish a code of signals and to so construct the derrick that the bucket could not

have struck him unaware, and thus his injury might have been reasonably anticipated from a failure to exercise such care."

It is thus seen that the learned Court of Appeals, in its very able opinion, concedes the rule to be that if the defendant should have anticipated that plaintiff might in the discharge of his duty in the progress of the work, come where he was struck and injured, then it was the duty of defendant to provide against that danger to plaintiff and that injury, by providing a system of warnings or a code of signals and by a proper construction of the derrick, as the learned Court of Appeals concedes. The court errs in its assumption that the defendant in this case could and should not have anticipated that the plaintiff might, in the course and discharge of his duty, come to the place where he was struck and injured. As a matter of law, this conclusion is erroneous. The progress of the work on the building in question, at the time of plaintiff's injury, shows that defendant should have anticipated the presence of the plaintiff on the top of the building at or about the time of his injury.

As we have seen, the building in question was constructed of iron or steel frame, with brick walls. The building was 140 feet long, 50 feet wide and 42 feet high. At the time of plaintiff's injury, the brickwork in the wall on the north side, which was being carried on under the superintendence of plaintiff as foreman of the bricklayers and hod-carriers, reached up to a point 35 to 39 feet high. The top of the north wall was within about six feet from the top of the building. Plaintiff testified as follows: "The brick work on the north was from 35 to 39 feet high." (p. 24, Abs.) So that it is thus seen that the brickwork had nearly reached the level of the top of the building where the derrick and the concrete work was situated and going on.

Again, at page 25, plaintiff testified as follows:

"Just previous to the accident, probably a day, we had done some work on the east end of the building, and at the time of the accident was working on the north wall along near the east end."

It thus appears that the bricklayers under plaintiff's control were working on the brick wall on the north side of the building along under the point where the concreters were at work with the derrick. As the brick-work thus approached the top of the building it became necessary to construct an additional scaffold, and it was in the work of building that scaffold from the top of the building that the plaintiff was engaged at the time he was injured; and in order to properly build that scaffold it was necessary, as will be seen, that plaintiff should be on top of the building with the men of his gang who were engaged with him in the construction of that scaffold. At the time the plaintiff was struck by the bucket, he was looking north. In testifying how he came to be there on the north wall of the building above his bricklayers, and why he was there, plaintiff gave the following testimony (pp. 25-26, Rec.):

"Q. What were you doing there, why were you there? A. I was there directing some laborers in the building of the scaffold, getting ready for the (—) bricklayers on top, so as they could reach down and get this wall up.

Q. What kind of laborers were they? A. They were hod-carriers.

Q. What department or work were they engaged in? A. They were in the brick gang. They were my laborers, and what I would term scaffold laborers, scaffold builders. They were the laborers I would take out of the rest of the hod carriers, to build the scaffold.

Q. Where were those brick men working? A. The rest of the gang besides the men I had on top?

Q. Yes. A. They were down below, they were underneath. They were all bunched—some of them were right immediately under the board I was putting down. This scaffold run along there about sixty feet, I think. However, some of them were further on towards the west end, finishing up some work there."

It thus appears that at the time that plaintiff was struck by the bucket and thrown off the building down 42 feet, he was engaged in the absolutely necessary work of building the scaffold on which he and a portion of the hod carriers were then engaged, so that the bricklayers who were still working right underneath him near the top of the building, might have this new scaffold on which to

work, as they were nearing the top of the building. Of course, the defendant, who had the contract for the erection of the entire building and for that purpose employed the concrete workers in the one gang and the plaintiff and the hod carriers, and bricklayers in another gang, knew, or must be taken to have known, of the stage of the construction of the north wall, at the time of plaintiff's injury. To state it otherwise, the defendant was bound to know when it put up the derrick in question, that during the work of the concrete gang the plaintiff and his brick men would be doing, about the time, and in the manner and place in which they did it, the precise work which the plaintiff and his brick men were doing about and at the time of plaintiff's injury, and the progress of the brick-work on the day plaintiff was injured indicated that the time had arrived when the whole force of bricklayers would soon be at the top of the building and plaintiff on that day would be required to go on top of the building and to be along the top of the building the whole length of it, including the point where the derrick was engaged. The evidence showed that this scaffold was to run along the building about sixty feet. The scaffold which the plaintiff was putting up was not to be, as the learned Court of Appeals seems to have thought, a scaffold at the precise point where the bucket customarily went over the wall, and nowhere else. The scaffold was to go along the length of sixty feet along the north side of the building.

The learned Court of Appeals in its opinion admits that "The plaintiff was free to discharge his duty of superintendence at any place on or about the building." It seems to us that this admission of the court destroys the force of its contention and argument that the defendant should not have anticipated the danger to plaintiff which caused his injury. Who could better know or anticipate the progress of the brick-work and the different stages of the different work on the building, and when it would be necessary for the plaintiff and his men to be on top of the building to

complete their work, than the defendant in this case who had charge of the entire building and of each department of the work and of all of the different gangs engaged in the work on the building?

The learned Court of Appeals also argued in its opinion, referring to the plaintiff and his work, as follows: "He could have performed it as efficiently without as within the track of the bucket." This is another erroneous conclusion of the learned Court of Appeals. The work of building a scaffold sixty feet along the north side of the building naturally required the presence of the plaintiff, as the superintendent of that work, all along that sixty feet and at every point in that sixty feet. The learned Court of Appeals seems to assume that the plaintiff was engaged in the construction of the scaffold in question at the point where the bucket went over the building, and at no other point. As we have seen, the plaintiff's duty required him to work all along the sixty feet, and of course it was his duty to be at all points of that sixty feet, and in working all along that sixty feet it must be assumed that the plaintiff had a right to and did take it for granted that the defendant as his employer and master had discharged defendant's whole duty, in the defendant's provision of the derrick and in the carrying on the work therewith so that the plaintiff could safely perform his work also. He was not required to examine the appliances on the building. (*Swoboda* v. *Ward, supra.*) He had a right to assume that the defendant had discharged its duty in the construction of the derrick and also in making provision for warnings or signals of the movements of the derrick. The whole point of that part of the opinion of the learned Court of Appeals which we have quoted, is that the defendant was not required to anticipate the danger to plaintiff.

The learned Court of Appeals also seems to assume that the bucket had a fixed path. The undisputed facts show that the bucket moved in a circle, both in being carried around by a movable

boom over the building to the point where the bucket was emptied, and in the moving of the bucket back from the point where it was emptied out over the building. And since on the conceded facts the bucket moved in a circle each way, and its course was in no way marked, nobody could know with certainty where the bucket would pass over the outer wall. And if before the brick men reached the top of the building they knew or might have known that the bucket was carried up over the building, they did not know and could not know of the course of the bucket over the top of the building, and they had a right to assume that the bucket was being moved by a lever or by guys and ropes, so as to control the movement of the bucket, and that warnings and signals of the movement of the bucket would be given.

In another part of the opinion of the learned Court of Appeals it is said: "There is no evidence that he attempted to notify the roofers of his presence or that they were aware of it." We do not understand how the duty of defendant in constructing this derrick and in its provision for signals and warnings, could be affected by the question of whether the plaintiff or any other of the brick men notified the concreters of their presence. Why should such notification have been given? The defendant was bound to assume that as the brick-work approached the top of the building, the plaintiff and his brick men would be just where the plaintiff was at or about the time of his injury. But, we repeat, it is not seen how the duty of the defendant in the construction of the derrick and provision for signals and warnings could have been affected by the question whether the roofers were notified or actually knew of the plaintiff's presence, or of his brick men. The knowledge of the roofers of his presence might possibly affect the question of the negligence of the roofers, but we are not counting in this case upon their negligence but upon that of defendant, in the construction of the derrick and provision for signals and warnings.

There was other testimony given at the time of the trial, the

same as the above testimony of the plaintiff, as to the stage of the work at the time of the accident, and also testimony of the description of the accident. We will not refer to the same more in detail, but will call the attention of the court to the pages of the record where that other testimony may be found. (pp. 33, 35, 36, 37, 38, 39, 45, 46, 48, 49, 51, 52 Rec.)

The uncontradicted evidence in the case shows that no system of warnings or code of signals was provided by the defendant in connection with the dangers which caused the plaintiff's injury. (Pages 41, 42, 49, 61, of the Record.)

Most of the evidence of the experts was to the effect that, in addition to the signals or warnings which were not given in this case, the movements of the bucket and of the derrick and boom should have been controlled by an arm or lever in the mast of the derrick; or by guy ropes attached to the boom but the uncontradicted evidence shows that no such arm or lever or guy ropes were provided by the defendant in the construction of the derrick. The testimony on that point may be found at pages 40, 52 of the Record.

The uncontradicted evidence in the case shows that the bucket which struck and injured the plaintiff was pushed with the boom by the men over the building, and that there were no counter ropes on the boom or lever by which the movement of the boom either way could be controlled. (p. 40 Rec.)

As to the description of the derrick and bucket and how the same were used as provided by the defendant, see pages 51-52, Record.

There was very much expert testimony introduced by plaintiff at the trial, of men of eminence as contractors and builders, all of whom testified as to the insufficient and improper method of construction of the derrick in question and as to the common usage under the same circumstances, of providing a system or code of signals and warnings. That expert testimony may be found at

pages 53, 56, 60, 61, 62, 66, 67, 68, 69, 70, 71, 79, 80, 81, 82, 83, 84, 85, 86, 87 of the record.

In another part of the opinion of the learned Court of Appeals it is said:

"The duty of construction and provision is the master's; the duty of operation and protection from negligent use is the servant's. The duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place not the machine shall become dangerous by their negligent use or operation, is the duty of the servant to whom their use and operation, is entrusted, and it is not any part of the positive duty of the master."

The correctness of these propositions as general statements of the law, cannot be questioned. But they do not lead to the result adjudged. There is no claim, and no claim in this case could be made, that the fellow servants of the plaintiff who operated the derrick in question used the derrick, boom and bucket in anywise differently than what it was intended they should use them, by the defendant. The derrick, boom and bucket, in the method of their construction and in the want of provision for signals and warnings, made the place where plaintiff was struck and injured, an unsafe place from the time the defendant placed the derrick, boom and bucket on top of the building. The assumption of the learned Court of Appeals, therefore, that the place where plaintiff was injured was until the moment of his injury a reasonably safe place and that he was injured solely by the collateral and independent negligence of the roofers at that instant of time while using properly equipped appliances in a safe place are not borne out by the facts. It was an unsafe place from the start, and the danger which caused plaintiff's injury did not arise from the negligent use by defendant's servants of a properly constructed derrick, boom and bucket, but arose from the use, in accordance with its design, of an improperly constructed derrick, boom and bucket from the start. There can be no claim, properly made, that the servants of defendant in charge of the derrick used the derrick, boom and bucket otherwise

than was contemplated by defendant it should be used in carrying on the work with the derrick.

No question arises in the case, nor can arise, between a proper and an improper use by the roofers, of the derrick, as constructed and provided by the defendant. The derrick, boom and bucket, as constructed by the defendant, and the want of provision by defendant of signals and warnings, made the place where plaintiff was injured an unsafe place from the beginning, and the danger was not made by any independent negligence of the fellow servants of plaintiff considered separate and apart from the improper construction of the derrick, boom and bucket and the want of provision of signals and warnings. Possibly the fellow servants of an injured employe may be said to be guilty of negligence with the negligence of the master, where those fellow servants use an improper and defective appliance; but the rule is a well settled one that if the negligence of the master in failing to provide a sufficient or proper appliance and a safe place is a contributing cause of the injury, the fact that the negligence of fellow servants may also contribute is no defense.

Grand Trunk Ry. Co. v. *Cummings,* 106 U. S., 700.

We wish, however, in this case to say that there is nothing in the record to show, as we have already stated and shown, that the fellow servants of plaintiff who were using the derrick, boom and bucket at the time of plaintiff's injury, used them any differently from what was contemplated by the defendant in the construction of the derrick and its appurtenances, and in the want of provision for signals and warnings.

In its opinion in this case, the learned Court of Appeals also said:

"The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do, necessarily changes the character of the place or of machinery as to safety, as the work progresses, is the duty of the servants

to whom the work is entrusted, and it is not the duty of the master."

And in this connection the learned court cites the case of *American Bridge Co.* v. *Seeds*, 75 C. C. A., 407; 144 Fed. 605, 611, 613.

It is hard to understand just what is meant by the court in this connection. The derrick, boom and bucket in this case were absolutely unsafe and dangerous from the the time the use of them was commenced by the roofers on the top of the building. Of course the danger from the use of the derrick, boom and bucket in this case increased or decreased with the number of men engaged in other departments of the work on the building called to the roof of the building. There was no change in the use or place of the derrick. But the court has already said, as we have seen in another part of the opinion, that the plaintiff was free to discharge his duty of superintendence at any place on or about the building, and the men engaged in the other departments of the work might at any time, in greater or lesser numbers, be called to work on or about the roof of the building in the neighborhood of the derrick. The extent of the danger to the other men engaged in the other gangs would undoubtedly be increased or diminished as those other men might or might not be called in the discharge of their duties to the roof of the building. There might be a dozen men of other gangs during a day that would be called up to the top of the building, and there might have been 50 men, or 75 men, or 100 men. But the danger was the same whether few or many of the other gangs of men were called to the top of the building. Of course there is a change constantly going on in the construction of any building. To say, as the learned Court of Appeals seems to say, that because of these necessary changes in the stage of construction in a building from the time its construction begins to the end, therefore the master may in the construction and provision of appliances for the use of any of his servants, neglect to provide a safe place, enunciates a rule, as it

seems to us, not supported by the decision of any other court and a rule which would have the effect of doing away altogether with the duty of a master in the construction of appliances and provision for warnings and signals in the erection of large buildings.

The case of *American Bridge Co.* v. *Seeds,* cited by the court, was an entirely different case from the case at bar. That was a case where the injury of the plaintiff was caused, as held by the court, by the negligent doing at the wrong time, of an act by a fellow servant.

Again it is said in the opinion in this case by the learned Court of Appeals, that: "The plaintiff and the roofers were fellow servants engaged in the common undertaking of constructing a building for their common master." This is true, but the injury to plaintiff in this case was not caused by the negligent failure of the roofers to give a signal or warning, in accordance with a system of signals or warnings provided by the defendant as the master, but was caused by the failure of the defendant to provide a system of signals and warnings. The fellow servants of the plaintiff were not guilty of negligence in not giving a signal or warning because no system of signals or warnings was provided by the defendant. The duty of providing a system of signals or warnings and the seeing that those signals and warnings were given, was the duty of defendant as master, and the performance of that duty could not be delegated to anybody so as to relieve the defendant from liability.

Again, it is said in the opinion of the learned Court of Appeals, that the place where the building was constructed, the materials and the machinery were free from any defects which contributed to this injury. Just what is meant by the learned Court of Appeals by this statement is perhaps not easy to determine. The place where the building was constructed, we may suppose, was like all other places where such buildings are constructed. It is

not claimed that there were any defects in the materials which were used in the construction of the building. It is not claimed that there were any defects in the machinery, if by defects is meant that either the wood or iron work in the machinery was defective in any way. What is claimed in this case is that the derrick as a machine was not properly constructed—not that the material in the derrick was defective in any wise. The claim is that the derrick as a whole was insufficiently constructed because: First: No lever was placed on the mast by which the derrick and the boom and bucket could have been revolved and controlled. Second: That there should have been guy ropes on the two opposite sides of the boom so that one rope could have been used to pull around the boom and bucket and the other to control and restrain its movements. The third claim is that the boom as put up was defective because no system by way of warning or code of signals was provided by the defendant as master, to give signals or warnings of the movements of the derrick and bucket. The latter was a want of provision and not a want of construction. The court in this case says that the duty of construction and provision is that of the master. It was just as much the duty of the master in this case to provide a system of signals and warnings, by whistles or otherwise, as it was to properly construct the derrick itself for use.

The court states the rule in this case as follows:

"The duty of construction and provision is the master's. The duty of operation and protection from negligent use is the servant's."

Again the court in its learned opinion, says:

"A lever on the derrick to swing the boom, or a guy rope on the north side of the boom to pull it over the wall would not have prevented the injury if the plaintiff had given no notice of his presence and the operator of the lever or of the guy rope had not seen him or notified him of the approach of the bucket."

This sentence in the opinion of the court, we submit, does not

state the rule as it should be fully stated. The court in a former part of its opinion had said:

"It might have been the duty of defendant to establish a code of signals, and to so construct the derrick that the bucket could not have struck him unawares, and this because his injury might have been reasonably anticipated from a failure to exercise such care."

These two citations from the opinion should, we think, be taken and read together. The correct statement, to use the language of the opinion, and transposing the two statements, would be as follows:

"A lever on the derrick to swing the boom, or a guy rope on the north side of the boom to pull it over the wall, would have prevented the injury, if the defendant as master had discharged the duty of defendant to establish a code of signals and to so construct the derrick that the bucket could not have struck him unawares, and this because his injury might have been reasonably anticipated from a failure to exercise such care."

If the court had left the word "not" out of the latter portion of its opinion cited above and had used the two portions of the opinion cited, as we have done above, we would, we submit, have had a correct statement of the law of the case. The latter clause cited from the opinion, wherein the court uses the following words: "A lever on the derrick to swing the boom, or a guy rope on the north side of the boom to pull it over the wall, would not have prevented the injury if the plaintiff had given no notice of his presence, and the operator of the lever or of the guy rope had not seen him or notified him of the approach of the bucket," is subject, as it seems to us, to several criticisms. In the first place it assumes that the plaintiff, as if he knew he was going to be injured, should have given notice of his presence. Why the plaintiff should have notified the roofers of his presence, unless he knew he was to be injured, is not seen. The plaintiff was doing nothing that threatened danger to the roofers, and he did not assume to suppose that the derrick was so insufficiently constructed that it would inflict injury on him. The above quoted language is

subject to further criticism from the words where it is said: "And the operator of the lever or of the guy rope had not seen him or notified him of the approach of the bucket." This language assumes that there was no negligence if the operator saw or did not see the plaintiff, but gave no signal or warning. This is objectionable on the ground that no account is taken in the above language of the necessity for provision by the master for a signal or warning, as the court in another part of the opinion, as we have seen, fully recognized.

Again, in the same part of the opinion, the learned Circuit Court of Appeals says:

"In other words, if the plaintiff himself and his fellow servants had pursued the same course with a lever and guy ropes as they pursued without them, the same result would inevitably have followed."

This language also takes no account of the omission of defendant as master to provide a system of signals and warnings. This last language quoted is subject to the further criticism that plaintiff himself did not use the derrick, with or without a lever, or with or without a guy rope. The fellow servants of plaintiff used the derrick without a lever and without a guy rope, for the reason that no lever or guy rope was provided by the defendant as master. The fellow servants of plaintiff cannot be guilty of negligence in not using a lever or a guy rope, if no lever or guy rope were provided by the defendant as master.

Again, the learned Court of Appeals in its opinion uses the following language:

"Moreover the only purpose of the lever or of the guy rope on the north side of the boom would be to control the movements of the boom so that the bucket would not strike the plaintiff, but their absence did not prevent such a control, because there was a guy rope on the south side of the boom, the end of which lay on the end of the building, with which the roofers might have effectually controlled the northern movement of the boom and the bucket."

This language of the learned opinion is subject also to criti-

cism, as it seems to us. The testimony of all the experts in the case to which we have referred (pp. 53 to 82 Rec.) shows that the one rope attached to the top end of the boom in this case was insufficient to control the movements of the boom and the bucket. And the conclusion, therefore, of the court that the boom and bucket might have been controlled by that rope in this case so as to have prevented the injury, is unsupported by the uncontradicted facts in evidence.

Besides, the question of whether or not the boom and bucket could have been controlled by the single rope used, was a question of fact to be tried by the jury and which should have been submitted to the jury instead of the trial court sustaining a demurrer to the evidence. The testimony of all the eminent experts on the question is, as we have already stated, that the appliances in the case of this boom were insufficient to control the proper movements of the boom and bucket, and protect third persons, and the failure to provide a system of signals and warnings also rendered the boom insufficient, and the legal conclusion from the undisputed facts shown by the evidence is not that stated by the court, but that if a lever had been provided, or two counter guy ropes for the boom and a proper system of signals and warnings had been provided, the injury of the plaintiff in this case would not have occurred. The undisputed facts of the case show that plaintiff was not familiar with either the construction or the mode of operating the derrick in question (pp. 34, 35, 37, 38, 40, 41, 50, Rec.)

The opinion of the learned Court of Appeals in this case stands alone in its enunciation of the law arising on this record. The doctrine of the case is opposed to the judgment given by this same Circuit Court of Appeals in the case of *Austin Mfg. Co.* v. *Johnson, supra.*. The doctrine of this case is also directly opposed to the proposition adjudged in the case of *Grace* v. *Kennedy*, 99 Fed., 679; 40 C. C. A., 69. That was a case where third parties had been injured by an insufficient derrick, the same as in the

case at bar, and the Circuit Court of Appeals of the Second Circuit, in that case held:

"That the master can not escape liability under the rule that the duty of the master to provide safe places does not apply where the place originally furnished is safe and becomes unsafe in the progress of the work, or because of the manner in which the work is done, since it cannot be said that the place (the street) originally furnished is safe unless it was protected by danger signals or watchmen."

In that case it was further adjudged as follows:

"Work was done at night upon a structure where guy ropes were run into and across the street. A wagon of a third person ran against one of the ropes, which caused plaintiff to fall from where he was working on the structure. There were no lights or watchmen in the street near the ropes. *Held*, that the fact that when the workmen on the job began work sufficient appliances in the way of lamps were furnished does not exonerate the master within the rule that when the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, the master is not liable, since the place could not be considered reasonably safe when the workmen began their night's work unless an adequate system was adopted for their protection against dangers easily to be anticipated."

The opinion of the learned court in the case at bar is directly opposed to the proposition thus adjudged by the Circuit Court of Appeals of the Second Circuit in that case.

In that case the following proposition was also adjudged:

"The usual practice as to guarding obstructions at night in the streets of a city where men were at work was to place red lamps on the obstruction or to employ watchmen. A master had provided four red lanterns, two of which had been broken before the night of the accident, and the other two had been placed on that night at one obstruction, but there were none on the obstruction which a third person encountered, thereby injuring a servant. The evidence as to whether a watchman had been designated to give warning was conflicting. *Held*, that the question of whether the obstruction was sufficiently protected was for the jury."

The opinion of the learned court in the case at bar is also

opposed to that proposition thus adjudged by the Circuit Court of Appeals of the Second Circuit.

In the case of *Western Electric Co.* v. *Hanselmann,* 136 Fed., 564; 69 C. C. A., 346, it was adjudged by the Circuit Court of Appeals of the Second Circuit as follows:

"Where a servant is set to work in a place safe in itself, but in which he is exposed to danger from the doing of work by other servants not connected with his own, the master is bound to employ the necessary means to give him timely warning of such danger, and cannot delegate such duty to any other persons, so as to relieve himself from liability for the negligent failure to give such warning."

The following proposition was also adjudged in that case:

"Where plaintiff, an employee, was sent to work where he was obliged to stand partly inside the door of the elevator shafts, and was struck and injured by one of the cars, which were continued in use by other servants, who had been directed by the master to give plaintiff warning of the approach of the cars, which in this instance was not done, the facts justified a finding by the jury that the master did not perform its duty in respect to furnishing plaintiff with a safe place to work, in that it did not either stop the cars, or provide some one who should devote his attention to keeping watch, so as to give plaintiff due warning."

We submit, that the opinion of the learned Circuit Court of Appeals, in the case at bar, is directly opposed to the doctrines thus adjudged by the Circuit Court of Appeals of the Second Circuit. The opinion of the learned Circuit Court of Appeals in the case at bar is also opposed to the decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *National Refining Co.* v. *Willis,* 143 Fed., 107; 74 C. C. A., 301.

So in the case of *Thompson-Starrett Co.* v. *Fitzgerald,* 149 Fed., 721; 79 C. C. A., 427, it was adjudged:

"If the building of stagings and scaffolds is not within the duty of the servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master for an injury resulting from their negligent construction."

The opinion of the learned Circuit Court of Appeals in the case at bar is also opposed to the propositions adjudged by the Circuit Court of Appeals of the Seventh Circuit, in its opinion in that case.

The opinion of the learned Circuit Court of Appeals in the case at bar is also opposed to the settled law of the state supreme courts.

The decision of the Circuit Court of Appeals in this case leaves as the only possible grounds of liability of the master to the servant in respect of a safe place any defects in the materials used in construction. But as the master cannot be made liable to the servant upon the ground of defects in the materials used in construction, where the master used ordinary care in the purchase of the materials, it follows that the opinion of the learned Circuit Court of Appeals in this case, if carried out to its logical result, would eventually leave the master without any liability to furnish a safe place to his servants in any case that could be supposed or conjectured. In short, the effect of the opinion of the learned Circuit Court of Appeals in this case abolishes, as it seems to us, the rule of the liability of the master to furnish his servants a safe place in any possible or supposable case that might arise, certainly in the erection of a building.

The question thus involved is one of great importance to both the employers and the employees of America. The number of both classes runs up into the millions. But this question is not only important when considered in relation to our industrial life, and those immediately engaged therein, but is important when considered as affecting the social life of the American people and our advancing civilization as a nation. We have been acting for some time, both on the part of the people and of the courts, state and federal, upon the theory that the master employer owes certain duties to the servant employe, and upon the theory that the progress, safety and well being of the whole people depend upon the proper recognition of the rights and duties of both classes. All

this is, however, swept away if the decision in this case of the learned Circuit Court of Appeals is carried out and is given full force and effect. The question involved, therefore, is one of great public importance.

If the court should not decide this case upon the point of jurisdiction, then we submit that upon the full consideration of this case the court should settle the conflict between the Circuit Court of Appeals in this case and the other Circuit Courts of Appeals decisions, and the conflict also between this Circuit Court of Appeals and the decisions of the courts generally on this subject.

If the case should be decided upon this ground, then we ask that the judgments of the trial Circuit Court and of the Circuit Court of Appeals be reversed and this case be remanded to the Circuit Court for a new trial.

In submitting this petition for a *certiorari* we call the attention of this court to its decision in *Hammond* v. *Forsythe*, 166 U. S., 506, and *Fields* v. *United States*, 205 U. S., 292.

We have filed with this petition for the writ of *certiorari* a duly certified copy of the entire record of this cause in said Circuit Court of Appeals, and the number of uncertified copies required by the rules of this court, and we refer to those records as a part of the petition filed herewith.

Your petitioner, in conclusion, prays this court to grant the writ of *certiorari* herein to said United States Circuit Court of Appeals of the Eighth Circuit.

Rees Turpin

James S. Botsford

Attorneys for Petitioner.

State of Missouri, County of Jackson.—ss.

Rees Turpin, being duly sworn on his oath, states that he is

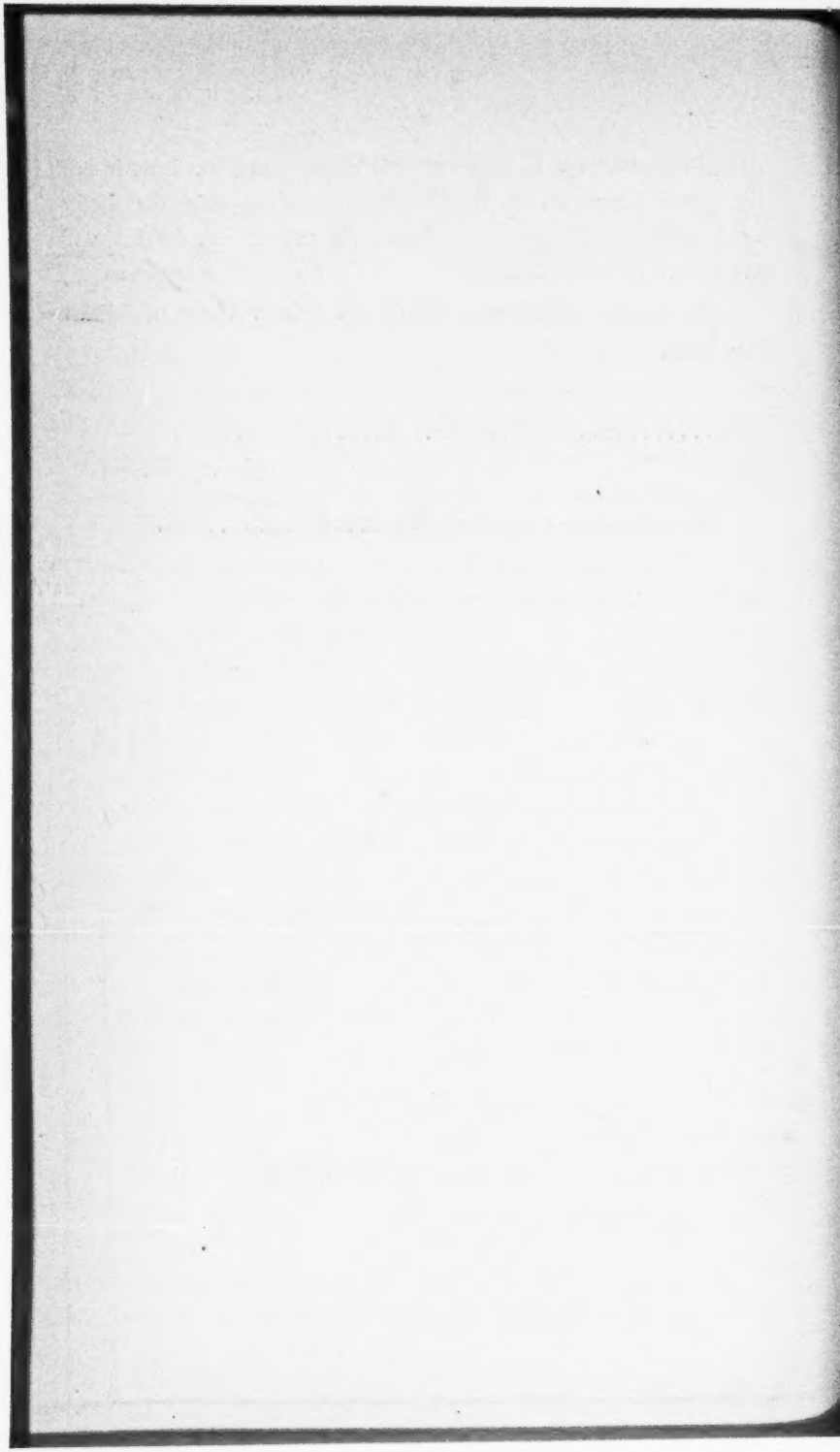
one of the attorneys of petitioner in this case, and has been in both the Circuit Courts and in the Circuit Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true as he verily believes. Reed Thurston

Sworn and subscribed to before me this 2nd day of September, 1907.

Mary E. Jordan

Notary Public.

My commission expires March 7, 1910



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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1908.

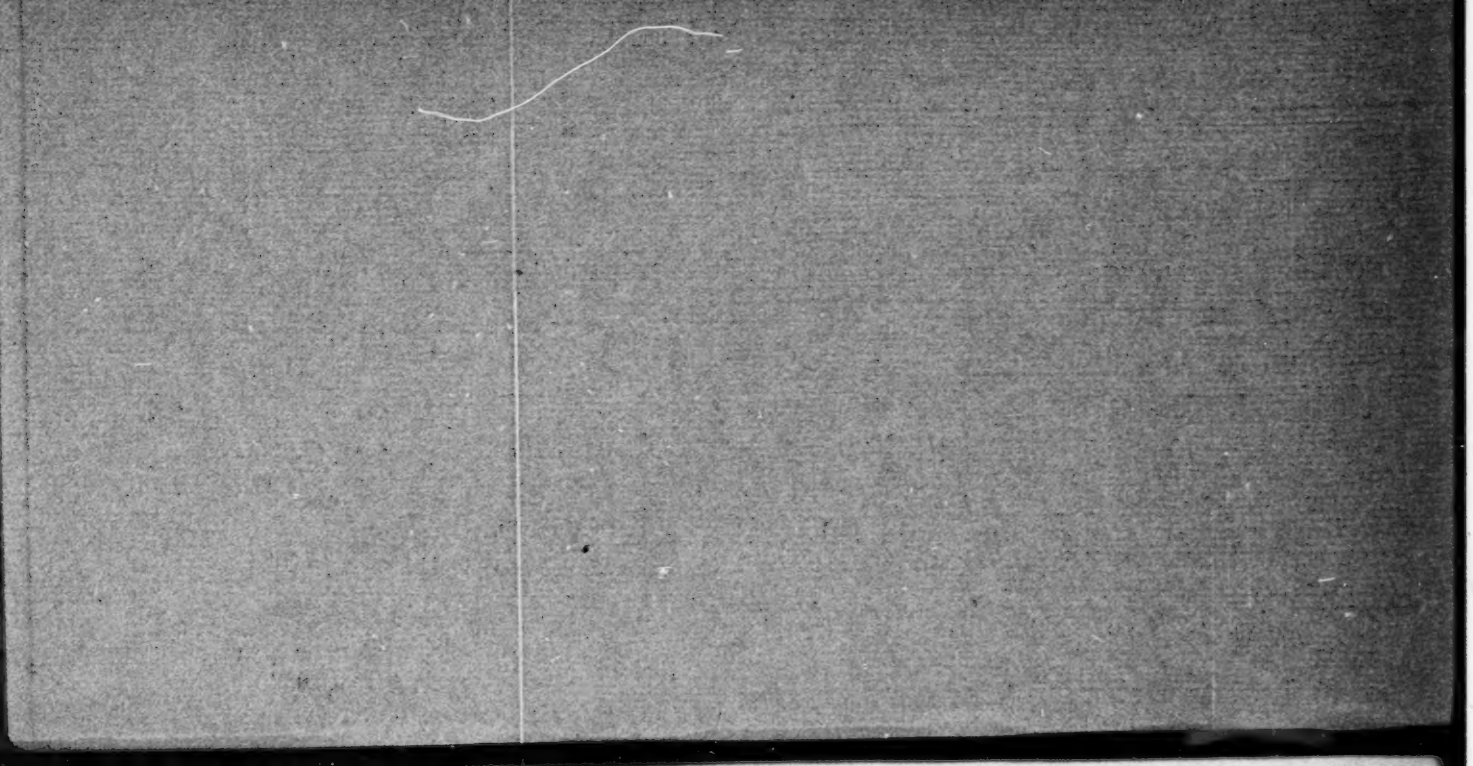
EUGENE C. KREIGH, *Petitioner,*
vs.
WESTINGHOUSE, CHURCH, KERR & COMPANY, *Respondent.*

No. 188.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Statement, Specification of Errors, Brief and Argument for Petitioner.

REES TURPIN AND
JAMES S. BOTSFORD,
Attorneys for Petitioner.



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STATEMENT OF THE CASE.

This suit was brought by petitioner as plaintiff against respondent, a corporation, as defendant, in the District Court of Wyandotte County, Kansas. From that court the suit was removed by the defendant company to the Circuit Court of the United States for the District of Kansas, First Division. Afterwards the case was tried in said United States Circuit Court, by the court, with a

jury, and the defendant company interposed a demurrer to the evidence adduced on behalf of the plaintiff, which demurrer was sustained by the court, and the court directed the jury to return a verdict for the defendant, to which action plaintiff excepted. The verdict of the jury was accordingly given for the defendant, which being followed by final judgment, the case was taken by plaintiff by writ of error to the Circuit Court of Appeals of the Eighth Circuit, where the judgment of the trial court was affirmed, and afterwards this court granted a writ of certiorari to said Court of Appeals, and the case comes to this court on said writ of certiorari.

Plaintiff was a foreman under the employment of defendant in the erection of a large building for Proctor & Gamble Company at Kansas City, Wyandotte County, Kansas, which building was erected to be used as a soap factory for and by said Proctor & Gamble Company. The defendant was and is a corporation, and had the contract for the erection of that building. Plaintiff, while acting as foreman for defendant as such contractor for the erection of said building, received a very severe injury which was caused, as plaintiff claims, by the negligence of the defendant as master and employer of plaintiff.

The frame of the building was composed of steel and the walls were being constructed at the time of plaintiff's injury, from brick laid in the steel frame. Plaintiff was defendant's foreman in charge of the brick-layers who laid said wall. All of the brick-layers engaged in laying the walls of this building were employes of defendant under charge of plaintiff as their foreman. At the time that plaintiff was so engaged as such foreman defendant had another set of workmen wholly separate and apart from the brick-layers who were engaged in constructing a roof on top of said building, and in the

construction of said roof concrete was used by said roofers. For the entire building defendant had a general superintendent of all the gangs and of the entire construction including the said roofers and brick-layers. That superintendent was Mr. Clem. Said building was over forty feet high from the ground, and the concrete used by the roofers in the construction of said roof was raised in a large bucket from the ground on the north side of the building, and then carried over the top of the building, all by means of a derrick on top of the building. This derrick was furnished by defendant and was under the charge and control of its roofers and was used for the purpose of lowering the concrete bucket from the top of building to the ground and then raising the bucket to the top of the building after the bucket was filled with concrete, and then the bucket, by means of the derrick, was swung to the point of the building where it was desired to empty the concrete from the bucket, and the concrete was emptied by means of a bottom which constituted the bottom of the bucket, which bottom was opened and closed by means of a catch or fastening, and then the bucket was, by a strong and vigorous push made by the roofers, swung back out over the top of the building and re-lowered by a pulley to the ground and re-filled. This strong and vigorous push of the bucket so as to carry it out surely to a point beyond the building where it commenced its descent was made necessary by the absence of a lever on the mast, and of guy ropes on the boom. As we have stated, this bucket was lowered and carried up the north side of the building outside of the wall. Plaintiff and the brick-layers had nothing to do and no connections with the derrick either in its construction or use.

At the time of plaintiff's injury, plaintiff as such foreman and the brick-layers under his charge were en-

gaged in building the wall on the north side of the building. The building was about 140 feet long, running east and west, and over forty feet high. The duty of plaintiff as such foreman and of the brick-layers under his charge, required them to be all along the entire length of the building. At the time of plaintiff's injury, plaintiff and his brick-layers had so far progressed with the work of laying the north wall along the entire length of said building that they were in the neighborhood of ten feet from the top of the building. The work of laying the brick wall was rapidly approaching the top of the building along the entire north side.

In this situation the plaintiff, in order to continue and complete the work of laying the wall and in order necessarily to complete the wall proceeded to the top of the building along the north side for the purpose of superintending the laying of a scaffold on which the brick-layers could work while on the top of the building so as to continue the laying of the wall. He was engaged in this work of superintending this scaffold to run along the entire length of the building, at the time of his injury. The derrick in question was about midway between the north and south sides of the building, which was fifty feet wide, and was well towards the east end of the building. At the time of plaintiff's injury it so happened that he was about opposite the point where the derrick was thus situated. That is, the plaintiff was near the north wall, looking, while so engaged in the work of superintending said scaffold, north, east and west, while said scaffold was being built. That is, said scaffold as being built along the north side of said building, and the plaintiff while standing on the north side of the top of said building and while superintending the building of said scaffold along said north side, was looking north and west towards that part of the scaffold which

was being built west and north and east, towards that portion which was being built east. While plaintiff was thus absorbed in the work imposed on him by defendant, of superintending the erection of said scaffold and the completion of said brick wall to the top of the buildink, plaintiff was, without any notice or warning, struck by the empty bucket of said derrick so engaged in the carrying of said concrete as said bucket was swung over to go down and bring up another load of concrete. The bucket was a large, heavy conveyor. And the plaintiff's charge is that defendant company, which furnished the appliance of said derrick and bucket, was guilty of negligence which caused plaintiff's injury, in the following respects:

First, it is claimed by plaintiff, and the evidence is uncontradicted, that there was no code of signals instituted, or used by defendant in the use of said derrick, to warn the employes of the other gangs of laborers on said building of the movements of said bucket, in moving, whether loaded or unloaded, over the top of said building and down the north side thereof. And the theory of the plaintiff on this branch of the case is that that was a duty which the defendant, as master and employer, owed to the employes engaged in other gangs on said building.

Second: It is furthermore claimed by the plaintiff, and that claim was supported by the uncontradicted evidence, that the mast in said derrick should have been controlled by a lever, and that such lever was not in the mast of said derrick and that in consequence of the want of such lever, the moving of said bucket by the pushing of it swiftly and without control out over the top of said building so as to go down below, put the bucket necessarily beyond the control of anybody after it was started on its way, and that it was negligence on the part of

the defendant as the master and employer, to omit to place upon the mast of such derrick such lever so as to control the movements of the boom and the bucket in their movements to and from out over the top of said building where other men might be employed. On this derrick was what is called and is well known as a boom, which in this instance swung out over the top of this building.

Third: And the claim of the plaintiff is and the uncontradicted evidence shows, that at the end of this boom defendant neglected to put two guy ropes, one on each side, to control the movement of the boom each way, and that the use of both of said ropes was necessary to control the movement of said boom either way, and the consequent movement of the bucket so as to prevent injury to others.

Plaintiff claims that these several negligences of the defendant in installing this derrick, boom and bucket, and the use thereof, caused his injury. There is no claim on the part of plaintiff that, independently of these negligences on the part of the defendant as plaintiff's master, the roofers who used the derrick, boom and bucket, were guilty of any collateral or independent negligence. But the case shows that the roofers using these appliances furnished by defendant, used the same in all respects as was contemplated and intended by the defendant, who was the common employer and master of both gangs.

After the issues were made up on the original pleadings in the case (pp. 3-13, Rec.) plaintiff filed an amended petition (pp. 13-16, Rec.). Said amended petition counted on the same cause of action as the original petition, and said amended petition is in words and figures as follows:

"IN THE CIRCUIT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF KANSAS,
FIRST DIVISION.

Eugene C. Kreigh, *Plaintiff*,
v. No.——;
Westinghouse, Church, Kerr & Company,
(a corporation) and The Proctor &
Gamble Company (a corporation),
Defendants.

AMENDED PETITION.

Plaintiff for his cause of action states. That defendants are and have been at all times hereinafter mentioned, corporations duly organized, created and existing;

That defendant, the Proctor and Gamble Company, is the owner of and has control of a certain soap plant in the City of Kansas City, Kansas, with buildings and appurtenances thereto belonging; and that said plant was during the year 1904 in course of erection and construction for said defendant, the Proctor and Gamble Company, by said defendant Westinghouse, Church, Kerr and Company under a contractual relation between said defendants, and that said The Proctor and Gamble Company has had a supervising interest in all of said work; that at all times herein stated plaintiff has been in the employ of defendant Westinghouse, Church, Kerr and Company as foreman of the brick work on said plant.

That on the 25th day of October, 1904, plaintiff was standing on the upper part of one of said buildings about 42 feet above the ground near the north wall thereof, engaged as foreman as aforesaid in the service of defendant Westinghouse, Church, Kerr and Company in looking after such brick work, and was at such time and place in the exercise of reasonable care and caution.

That at such time there was in said building certain other workmen of defendants engaged in concreting the roof of said building, and managing, operating and controlling a derrick owned by defendants and used in connection with such concreting work; that plaintiff had no control over and no connection with said concrete workmen on said derrick.

Plaintiff further alleges that on said October 25th, 1904, there was a wooden tub or bucket attached by rope to said derrick which was used by defendants in raising concrete from the ground to the top of said building.

While the plaintiff was engaged as hereinbefore alleged in the performance of his duties in said building he was suddenly and without warning struck by said bucket or tub and knocked from the top of said building headlong to the ground below, a distance of 42 feet, and thereby injured as hereinafter alleged.

Plaintiff's said injuries were caused by the carelessness and negligence of the defendants in this, to-wit:

1. The defendants were careless and negligent in furnishing and operating a defective, improper and unsafe derrick, to raise, move and lower said tub or bucket;

(a). Said derrick was so constructed and operated that there were no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employes of the defendants violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building and also move with it said arm.

(b) Said derrick was so constructed and operated that there was no means of stopping or controlling it or the bucket or tub attached thereto after the bucket or tub was emptied and started toward and over the wall or said building.

(c) The ropes and pulleys of said derrick were defective, insecure and improperly arranged and used.

2. The defendants were careless and negligent in causing and allowing said bucket to be violently pushed and swung against the plaintiff without notice or warning to him.

3. The defendants were careless and negligent in failing to supply and use a system of signals or warnings to notify persons on the building when the derrick, tub or bucket were to be moved, raised or lowered.

By reason of the carelessness and negligence of the defendants hereinbefore alleged, plaintiff received the following severe and permanent injuries:

Plaintiff's lower jaw was dislocated, fractured, broken and permanently injured; nearly all of his teeth were either knocked out at the time or were so damaged that they have since had to be removed on account of said injuries; that his lips and face were cut and are permanently disfigured; both elbows, his ribs and left foreleg were bruised and are permanently injured; plaintiff was and has for a long time been confined to his bed, and has suffered pains in his side, difficulty in breathing, pains in his legs, inability to chew food or move his jaw, and has been troubled with difficulty in swallowing on account of said injuries. Plaintiff has suffered by reason of all of which both great bodily and physical pain and mental anguish and has lost and will in future lose a great deal of time from his business and in looking after his affairs, and has expended and will in the future expend large sums of money in medical attention and medicines, and nursing in connection with such wounds and injuries, and has been permanently injured in all to plaintiff's damage in the sum of Fifteen Thousand ($15,000.00) Dollars.

Wherefore plaintiff prays judgment against defendants for the sum of Fifteen Thousand ($15,000.00) dollars, and for costs of this action.

ELLISON & TURPIN, AND
MCFADDEN & MORRIS,
Attorneys for Plaintiff."

In bringing this suit, the owner of the building being constructed, namely, Proctor and Gamble Company, was joined with the defendant as one of the defendants in the suit. Afterwards the suit as to the Proctor & Gamble Company as a defendant was dismissed, and thereafter the suit proceeded against the other defendant, Westinghouse, Church, Kerr & Company, which was the contractor, as already stated which erected the building. (p. 20, Rec.)

The answer of the defendant to the amended petition of the plaintiff, consists of four parts. (pp. 17-18, Rec.) First, it denies every allegation in the amended

petition which put in issue all of the averments of plaintiff's amended petition. Said answer, not being under oath, did not have the effect of putting in issue the corporate character of the defendant company. The second defense of the defendant set up in its answer, was to the effect that the injuries of plaintiff were caused by the careless, negligent and reckless acts and omissions of plaintiff. The third defense was, in substance, that plaintiff in respect of the risks and dangers complained of, had assumed the risk thereof as a part of his employment. The fourth defense of the defendant in its answer was, that plaintiff's injuries were caused by the acts of a fellow servant or fellow servants of the plaintiff.

To this answer, plaintiff filed a reply denying each and every allegation contained in said answer and thereby putting in issue all the said averments of said answer. (p. 19, Rec.)

There was a trial to a jury, a directed verdict for the defendant, and a final judgment for the defendant. (p. 20, Rec.)

In due time the plaintiff filed a bill of exceptions containing a full history of all the proceedings at the trial and a copy of all of the testimony. The bill of exceptions extends from page 23 to page 89 of the Record. The bill of exceptions, from page 23 to page 88, sets out the evidence in the case. It appears from the said bill of exceptions (p. 89, Rec.) that the same contains all of the testimony and a statement of all the evidence introduced and offered upon the trial of this cause, together with all objections, rulings and exceptions saved, demurrer to plaintiff's evidence, demurrers, rulings thereon and exceptions.

We will here give a resume of the testimony contained in said bill of exceptions and offered by plaintiff. The plaintiff was himself a witness. (pp. 23-28, Rec.) The following is a summary of his evidence:

"I was employed by Westinghouse, Church, Kerr & Company as foreman of the brick work. The building was known as a partial steel construction, the steel work forming all the supports of the building. The building was probably 130 or 140 feet long by 50 feet wide. At this time the steel work was all in to the height of 42 feet and probably a few inches. My recollection is the steel was all in place. The brick work on the north was from 35 to 39 feet high, as it was built up in sections. The steel construction consisted of steel columns. They were steel built up out of irregular iron and different shapes of iron riveted together to form the supports of the building and also for the machinery. The building proper was also a house for the protection of the machinery and boilers, and the boilers were put up in connection and were built right in. The whole building was built right up together. They were upright columns, yes, with steel bands running across different places to form coal bunkers, and formed floors and roofs, and then the brick work to protect that steel on the outside from the weather. It was all covered with brick work. The brick work went up around to keep the weather away from it and to enclose the building in between. I had worked six days just prior to the injury. I had worked some previous to that time. I had started the job, but had been off three weeks, or about that, and had been back to work about six days. At the time of the accident we were working along the north wall along near the east end. I was knocked off the building and fell 42 feet. I was knocked off by a bucket, a concrete bucket. At the time I was struck by the bucket I was standing on the board that was lying right over the north wall, or just so it would clear the north wall, when it struck me. I was looking north. I was there directing some laborers in the building of a scaffold so that the brick-layers could reach down and get this wall up. These laborers were hod carriers. They were in the brick gang. They were my laborers and what I would term scaffold laborers, or scaffold builders. They were the laborers I would take out of the rest of the hod carriers to build a scaffold. Those brick men were working down below, they were underneath. They were bunched. Some of them were immediately

under the board I was putting down. This scaffold run along there about sixty feet, I should think. However, some of them were further along towards the west end finishing up some work there. On this day and prior to this time, the brick-layers, laborers and men engaged in the brick work had been working below. They had no brick work above. We had not got up to those steel bands. I was knocked off probably from three to five minutes after we had been at work on top of the building. At the time I was looking along this wall directing the building of the scaffold. I could not say positively, but I probably looked—my best view would be east. west and north. I was on the north wall building that scaffold, right over the men. The bucket came from the direction of the south I did not hear any signal or warning before the bucket struck me. I heard some remark from some one just as it hit me, just as I was going over the wall. I do not know where that came from, I don't know who it was. I fell from the top of the steel structure to the ground. In going down I struck a coal conveyor. There was a steel coal conveyor or brackets fastened into the building below that came up to carry coal to the bunkers. It went up at an angle on the side of the building, bolted on, and about half way to the ground is where I encountered that. At the point I went over it was probably 20 feet below where I was and 20 or 22 feet from the ground. I struck the edge of that when I went down, just grazed it, so far as I know. I struck the ground when I reached the ground."

Mr. Kreigh, at page 27-29 of the Record, gives a full account of the severe injuries which he received from his 42 feet fall from the top of the building to the ground.

It was admitted by the defendant that said defendant was building this entire building and had charge of the entire work, and that all the men were in defendant's employ, and that this included the concrete men as well as the brick men. (p. 30, Rec.)

It appears from plaintiff's cross-examination (p. 31,

Rec.) that he had been on top of this roof where this derrick was situated, twice before the time of his injury. Once he went up to the west end of the building, and the other time to the east end. But it appears from his testimony that the derrick was not in use either of those times, and it furthermore appears from the plaintiff's evidence (p. 50, Rec.) that he did not know at the time of his injury that there were no ropes furnished by the defendant on the derrick in order to stop or start the boom, and that he did not know that there was no lever upon the derrick in order to control it and stop it or start it. Plaintiff testified that the concrete men were not on the roof where this derrick was used at the times he was on there before he was injured. (p. 32, Rec.) Plaintiff also testified that he was not familiar with the manner in which the derrick and bucket were furnished and operated by the defendant and used by the defendant's employes. (p. 33, Rec.) Plaintiff also testified that if he had been warned of the approach of the bucket, he could have gotten out of the way. (p. 50, Rec.)

On re-examination, Mr. Kreigh testified as follows: (p. 39, Rec.)

"Q. You say you had been up on this building twice before the time of this accident? A. Yes, sir.

Q. Where were you the first time? A. The first time I was on the west end of the main building.

Q. How far was that from where this derrick stood? A. Probably seventy-five or eighty feet.

Q. Did you see the derrick in operation that day? A. No, sir.

Q. The other time you were there, where were you? A. I was on the east end of the building.

Q. What were you doing there? A. I went up there to show a man how to bring up a wall, how to finish a wall and get it ready to finish off.

Q. Did you see the derrick in operation that day? A. No, sir.

Q. Had you ever seen this derrick in operation from the top of the building? A. No, sir.

Q. Had the brick men or any of the brick-layers or any of the laborers connected with the brick-layers used this derrick prior to the time you were hurt? A. No, sir.

Q. Were you there when the derrick was put up? A. No, sir; I think not.

Q. How were you getting your material up to your brick men? A. In hods; using hod-carriers exclusively.

Q. Up ladders? A. Yes, sir; hodding it up ladders.

Q. At this place where you were when you were knocked off, how much space did you cover? A. With the scaffold I was building?

Q. Yes. A. My recolleution is—well, we did not have the scaffold completed. We had only just one up there. My recollection is there was two boards part of the way through and one all the way through, and that I was standing where there was two boards laid down—two-by-tens.

Q. How long had you been up there altogether? A. Probably from three to five minutes.

Q. Did you know prior to the time you were hurt, how many ropes they had on the boom? A. No, sir.

Q. Did you know prior to the time you were hurt, whether or not they had a lever on that boom? A. No, sir.

Q. Did you know what was the method of controlling that derrick and boom, prior to the time you were hurt? A. No, sir; not other that it was simply controlled by hand."

Plaintiff also testified as follows:

"Q. What did you do when you went upon the wall? Did you take a fixed position on the wall and stand there all the time, or were you walking back and forth on the wall with your work? A. I was attending to my work. * * * I moved around directing the work as any man would." (p. 35, Rec.)

The facts of the case are undisputed. It is undisputed and conclusive that the defendant in providing this derrick did not provide any lever in the mast. If this lever in the mast had been provided, the movements of the boom and bucket could have been controlled and those movements would have been so slow and deliberate as that such an injury as was suffered by the plaintiff in this case could have been prevented. It is also undisputed and conclusive that in providing the derrick in question defendant did not provide two ropes, or guy ropes, as they are sometimes called, at the end of the boom by which the movement in one direction of the boom with the bucket, by one rope, could have been moderated and controlled by the opposite rope, and that in that way the movements of the boom and bucket would have been so controlled and would have been made so deliberately as to prevent the injury to plaintiff which occurred in this case. It is also undisputed and conclusive that defendant in providing the derrick in question, did not provide a system or code of signals so as to warn people of just such dangers as inflicted the injury to plaintiff in this case. Of course around a building of this kind there was at all times a great deal of shouting and hallooing. There was no signal provided or given to warn people of the approach of this bucket, so as to warn people of the approch of this bucket, so as to warn people and prevent such accidents as occurred in this case.

In addition to the plaintiff, another witness was one B. F. Smith (pp. 38-50, Rec.) who was one of the bricklayers on this building. Mr. Smith testified as follows:

"A. My name is B. F. Smith; my age is thirty-one years; my residence is Kansas City, Kansas; I am a brick-layer by trade.

Q. Were you employed on the Proctor & Gamble plant just outside of Kansas City, Kansas, in October, 1904? A. Yes, sir.

Q. Were you employed there at the time the plaintiff, Eugene Kreigh, was knocked from the building? A. Yes, sir.

Q. Did you see the plaintiff when he was injured? A. Yes, sir.

Q. What happened there? A. The bucket of the derrick bumped him off.

Q. Knocked the plaintiff from the building? A. Yes, sir.

Q. Where was the plaintiff when the bucket struck him? A. He was on top of the building, close to the edge.

Q. On what was he standing, the wall of the building? A. Yes, sir; he was standing right along there on some planks right by the wall, I think. I am not sure. He was standing close to the edge, but I don't know exactly what he was standing on.

Q. Where were you at the time? A. I was working on the north wall.

Q. Of the same building? A. Yes, sir.

Q. Where was the derrick situated? A. Well, it was east of me, down, I suppose, fifteen or twenty feet. maybe more. I don't know exactly how far it was.

Q. How high was the building at that time? A. Well, it was around thirty-five feet, I suppose. That scaffold brought us up to the iron work we were working on then.

Q. What iron work was there at the top of the building? A. It was the roof of the coal chute, I guess.

Q. The iron beams for the roof of the coal chute? A. I think it was; yes sir.

Q. Where was the derrick situated with reference to the iron beams? A. It was setting back about ten or fifteen feet.

Q. On top of the beams? Yes, sir; on top of the beams.

Q. What was that being used for? A. They were hoisting concrete.

Q. What means did they use for hoisting concrete? A. They used the derrick.

Q. And what else? Did they raise it by means of a bucket? A. Yes, sir; they had a bucket.

Q. Did you see the bucket when it struck Kreigh? A. Yes, sir.

Q. Where was it coming from? A. It was coming from up on the building where they dumped the concrete.

Q. A load of concrete had been dumped and they were sending the bucket out over the building? A. Yes, sir.

Q. Do you know how that bucket was propelled out there? A. Yes, sir.

Q. How was it? A. They just give it a push and pushed it out over the building. * * *

Q. State whether or not the men operating the derrick were in such a position that they could see Kreigh when they pushed the bucket? A. Yes, sir; they could.

Q. What happened when the bucket struck him? A. It knocked him off the building.

Q. Where did he go from there? A. Down to the ground.

Q. Had you ever seen this derrick before it struck Kreigh? A. Yes, sir; I had seen it going up and down there.

Q. Had you seen it on the day prior to the injury to Kreigh? A. Yes, sir.

Q. Just state the circumstances how you happened to see it? A. I just came across upon top, going across there at noon time, and I come up to it and pushed it around. That is the first time I knew anything about how it worked.

Q. Were you up there in the performance of any duty? A. No, sir; I just went up there at noon time, going around over the building.

Q. What kind of a derrick was that? A. A stiff leg derrick.

Q. Do you know whether there was an arm or lever on the derrick? A. There wasn't any on it. There was a rope attached to it.

Q. How many ropes? A. Just one.

Q. Did you see the derrick after the injury? A. Yes sir.

Q. Did you work with it after the injury? A. Yes, sir; we used it afterward.

Q. Was there any change made in the derrick or its operation between the time of the injury and the time you worked with it? A. No, sir.

Q. How was that derrick operated? A. They had a rope attached to the boom, at the end of the boom, and they would push it out and pull it in with the rope.

Q. How did they push it out? A. They just give it a swing and pushed it out. There was a floor where the derrick was at and there was a space that was not floored out at the edge, and they had to give it swing enough to throw it out over that space, so it would go out over the wall.

Q. Prior to the time Kreigh was knocked off of the wall by that bucket, had the brick-layers gang used that bucket? A. No, sir.

Q. For what was it used prior to that time? A. Hauling up concrete."

Another witness for the plaintiff was D. A. Riley (pp. 50-53, Rec.) who was a brick-layer on the building in question and testified as follows:

"Q. Where do you live? A. Kansas City, Kansas.

Q. What is your occupation? A. Brick-layer.

Q. Where were you employed in October, 1904? A. Proctor & Gamble soap plant in Armourdale.

Q. Were you employed in the brick gang, as it is called, under Mr. Kreigh's superintendence? A. Yes, sir.

Q. Do you remember the time Mr. Kreigh was hurt? A. Yes, sir.

Q. Did you see him knocked off the building? A. I didn't see the bucket hit him, but I saw him falling. * * *

Q. Had the brick gang, or the brick-layers or the laborers any connection with the concrete gang in using this derrick prior to the time Mr. Kreigh was hurt? A. No, sir.

Q. Did they use it afterwards? A. Yes, sir.

Q. You and Mr. Smith worked together then? A. Yes, sir.

Q. What kind of derrick was this? A. Stiff leg derrick.

Q. What is a stiff leg derrick? A. There are two beams or legs that run on the floor in an acute angle, and where they meet at the end there is a mast standing up. From the top of the mast there are two boards running out to the floor, with a boom attached on the side that work or swings around.

Q. This derrick had not been moved from the time Kreigh was hurt until you worked there? A. No, sir.

Q. Where was it situated? A. At the northeast corner of the building, probably just about twelve feet South of the North wall an equal distance West of the East wall.

Q. What was it situated on? A. It was resting on top of the steel beams that were to form the roof of the coal bunkers.

Q. Was there any kind of flooring there? A. There were some boards lying on top of the steel beams, back from the wall probably twelve feet.

Q. What was between those boards and the North wall? A. There was an open space.

Q. Where did the boom of this derrick swing? A. It swung from—well, it could swing from the east around to the west, swing north or back the other way.

Q. How was it used there to bring up the material? First, where did the material come from? A. From the ground.

Q. How did they get it on the top? A. They hoisted it up in a bucket or square box.

Q. What power did they use. A. Steam power from a steam engine.

Q. Where was the engine? A. Situated north of the building, out on the ground.

Q. The bucket was hoisted by means of a rope? A. Yes, sir.

Q. When it was swung up to the top o fthe building, then what was done? A. There was a tag line attached to the end of the boom, and some one on the building would pull the rope and the boom would swing around on the building.

Q. How are those buckets dumped? A. The

bottom of the box was hung on hinges and fastened with a clasp and pin. They would remove the pin and the bottom would fall down and the material would drop out of the box.

Q. How would they get the box out over the wall again for a new load? A. They just pushed it around by force.

Q. In what way? A. A man would push on the box and give it momentum that would carry it out over the wall.

Q. And over the open space that you mentioned before? A. Yes, sir.

Q. How many ropes were attached to that? A. One rope.

Q. One end of the rope was at the bottom. Where was the other end? A. Lying back on the floor.

Q. What was that rope used for? A. That was used to pull the boom around in the building, to pull the box in.

Q. Was there any rope on the other side of the boom to pull the boom out? A. No, sir.

Q. Was there any arm or lever on the mast of that boom with which to operate it? A. No, sir.

Q. Was there any way of controlling the boom of that derrick after it was once given a shove? A. No, sir.

Q. After they gave that shove, where would it have to go until it stopped? A. It would swing on around until it stopped of its own accord.

Q. Outside of the wall? A. Yes, sir.

Q. If anybody got in the way of that boom, was there any way of stopping it after they let go of it? A. No way that I could see.

Cross Examination.

Questions by Mr. Histed.

Q. There was a rope attached to the boom, a tag line, wasn't there? A. Yes, sir.

Q. Where was the other end of the rope? A. Lying back on the floor when I saw it.

Q. That is, it was in reach of the concrete gang of men, wasn't it? A. Yes, sir.

Q. Couldn't they move that boom backwards by the rope? A. What do you mean by moving it backwards?

Q. Stop it? A. If a man had hold of the rope he could stop it.

Q. You said to Mr. Turpin that there was no way, after that boom got started, that it could be stopped? A. Not when a man was pushing on the box.

Q. If the men took hold of that rope they could stop that bucket if it was going over the wall, couldn't they? A. Not in a short distance.

Q. Couldn't they stop that boom by holding on to that rope? A. Not in time to keep from knocking a man off.

Q. It is not a question of time. Couldn't they stop it? A. Yes, sir.

Q. They could pull it back? A. Yes, sir; they could pull it back.

Q. If they put sufficient force on it, they could stop it in a very short space, could they not? A. If there was two or three men ahold of it they could

Q. There was nothing but the empty bucket going back, was there? A. That was all.

Q. That is the only weight? A. Yes, sir.

Another witness in the case was James Cuthbert (pp. 53-62, Rec.) Mr. Cuthbert testified as follows:

"Q. What is your name? A. James Cuthbert.

Q. Your age? A. About fifty-seven.

Q. You live here in Topeka? A. Yes, sir.

Q. How long have you lived here? A. About twenty-seven years.

Q. What is your business? A. Contractor.

Q. Are you alone or have you a firm? A. I have a partner; the firm of Cuthbert & Sargent.

Q. How long have you and Mr. Sargent been together as partners? A. Twenty-one years.

Q. Among others, what buildings have you constructed in Topeka? A. This present building here, the building we are occupying now.

Q. That is, the Federal building? A. Yes, sir; the Federal Building. We had two or three different contracts in the state house; the Douglas County court

house last year, the Mitchell County court house; the old postoffice in Kansas City at the corner of 9th and Walnut.

Q. In Kansas City, Missouri? A. Yes, sir; and quite a number of buildings around the state.

Q. Did you in any of these contracts have direct supervision of the construction of the buildings? A. Yes, sir.

Q. Are you a practical builder? A. Yes, sir; I should say so.

Q. Have you, as such builder, had experiecne in using derricks for raising and lowering material on buildings? A. Yes, sir.

Q. Did you hear detailed this morning the manner in which the derrick upon the Proctor-Gamble building, about which this controversy has arisen, was constructed and operated? A. I did. * * *

Q. For the purpose for which you heard detailed this morning this derrick was being used, state how they are usually constructed. A. This derrick was what was called a stiff leg derrick, I understand. They are guyed with two stiff legs on an angle of probably sixty-five, and they are generally circled at the bottom and what we call head lines, a line on each side of the boom to guide it around, and with good and sufficient blocks and tackle. It is owing to what you are going to hoist with it. If you have a heavy lift you have to rig your derrick accordingly.

Q. How are they usually constructed for the purpose of moving the boom either in or out? A. You mean swing the boom around?

Q. Yes, sir. A. Well, it is owing to the state of the weather sometimes. When you are using a large derrick you have to use a block and tackle, sometimes with a lever. On this building here I used a block and a tackle and guyed the boom around. The usual way on a light derrick like that would be to have two guy ropes on the point of the boom, one to each side, and the duty would be of the men—one man detailed for each of them guy ropes—when you are moving that around, to hold the ropes and steady it.

Q. The purpose of the guy rope is what? A. Steady the boom as it goes around.

Q. State whether or not either of those guy ropes are used for the purpose of swinging it (the boom) in and the other to swing it out. A. One to swing one way and the other the other way, yes.

Q. State whether or not it is usual or customary, in the operation of such a derrick, to swing the boom out or in by men pushing upon the bucket supported by the rope running over a beam? A. No, not unless it is on the ground, probably. He might do it on the ground, probably.

Q. Up on a building forty-two feet above the surface, is that usual or customary? A. No, not in my experience. I wouldn't think that would be usual. I wouldn't think it would be right to do that way. * * *

Q. Is it usual to use a derrick on a building such as described by the witness Mr. Riley, who was on the stand just before noon, with no other means of controlling it than one line? A. No, it is not.

Q. Why is it not usual? A. Because you cannot control, in my judgment, a derrick with one line, because the wind on a derrick of any size will have an effect on it, especially when you get up forty or fifty feet in the air, and you generally have to put two ropes on it so you can guide it.

Q. If a derrick like that were shoved out by hand, as described this morning by the witnesses, could it be controlled in stopping by the use of one line? A. It could be controlled to a certain degree, but you could not control it as it ought to be, I don't think.

Q. Is it usual, in the construction or operation of such derricks, to have a code of signals by which the parties upon the building are notified when the boom is started either way or the bucket raised or lowered? A. In the construction of this building here—

The Court: (Interrupting) That is not the question.

Q. Is it usual? A. It is usual, yes."

Another witness in the case was Angus M. Turner (pp. 61-71, Rec.) Mr. Turner also testified as an expert. He was and had been a stone contractor extensively en-

gaged in the stone contracting business on large buildings in Kansas City, Missouri. He had been the contractor in the stone work in building the Christian Science Church, the Second Presbyterian Church, Swofford Brothers' foundation, Burnham-Hanna-Mungers', Armour Memorial, and all the work at their packing house in the last three years. (p. 62, Rec.)

The following questions and answers were propounded and given by Mr. Turner:

"Q. Now, Mr. Turner, if a derrick with a boom attached to the mast, so that the mast and boom will turn, so that the end of the boom will describe part of a circle, are placed on top of a building about forty feet from the ground, and such derrick is used for the purpose of raising material for construction to the top of a building by means of a rope attached to a bucket or tub and run through such derrick and attached to an engine on the ground, which engine furnished the power for raising the material, and the material was drawn up on the outside of the wall of the building in such bucket or tub, such hoisting rope being run through a pulley at or near the end of the derrick, and when such bucket or tub was raised to the top of the building the boom of the derrick was hauled in by a rope used for that purpose, and the bucket was lowered and dumped at the place to which it would be hauled in, and then pushed out by one or more workmen, so the bucket and the end of the boom of the derrick were swung out over the outside of the wall by the impetus given it by a shove, and the place where the material was dumped was a platform or floored space, and between that platform or floored space and the wall of the building over which the bucket swung was an open space with no flooring, in your opinion, did that comply with the usual and ordinary method of manipulating such a derrick as employed by reasonably prudent and competent men engaged in the same or similar business? A. No, sir; that is not the proper way to handle it."

Another expert witness in the case was W. N. Gedney, who had been engaged in building construction at

Kansas City. Mr. Gedney testified as follows: (pp. 83-89, Rec.)

"Q. You said in reply to one of Mr. Turpin's questions, that the only safe way to operate this derrick was to have a lever on the mast. Will you kindly, for my information and benefit, describe what the lever would do, supposing these papers were to represent the boom and mast?

Mr. Histed: The defendant objects to that because it is a mere argument of the witness, even assuming that a lever might have been proper to use.

The Court overruled the objection; to which ruling of the court the defendant at the time duly excepted.

A. You have a lever attached to the main mast, run out far enough for the power of one man to control the boom.

Q. Which way would that lever run as we have this derrick arranged here on this table? A. Your boom is always to the west; your main lever would run to the East.

Q. Would run east and west? A. Yes, sir.

Q. It would run east from the mast? A. East from the main mast.

Q. Would it extend west of the mast, or would it just be fastened there? A. It would not extend any West, as the mast would catch part of this boom.

Q. If it is fixed as you have described it, on the south side of the mast, how far from the base of the mast would it be? A. About thirty inches.

Q. That is, where a man could get hold of it easily, standing on the floor? A. Yes, sir.

Q. That is fixed solidly to the mast? A. Yes, sir.

Q. Like this, we will say? A. Yes, sir.

Q. Suppose he turns that boom to the north, what good does that do? A. Your line would be out here, so you could not turn in any further to the north, that a man couldn't get hold of it.

Q. The point about the lever is that by having the end attached to the mast solidly, by holding to the lever you can prevent the boom from swinging one way or the other? A. Yes, sir.

Q. But, as I understand you, a rope attached to the end of the boom would serve the same purpose on the swing out, although not on the swing in? A. Yes, sir, if they would hold it.

Q. In your work, what are you? A. General superintendent.

Q. You go out on the work, do you? A. Yes, sir.

Q. Do you control these levers? Do you take hold of them yourself? A. No, sir.

Q. You just see other men do that? A. I see that the men do.

Q. I suppose that you have done that in the past? A. Yes, sir.

Q. How long did you serve in that capacity? A. A very short time, off and on.

Q. Just when a man would be absent? A. Yes, sir.

Q. Your regular business is not to control those derricks? A. No, sir.

Q. You are superintending the work? A. Yes, sir.

Q. And a laborer does that work? A. Yes, sir.

Q. So that what you know about it is gathered from occasionally doing it yourself and watching other men do it? A. Yes, sir; I know that it should be done.

Q. What you know about it has been gathered from what you have seen yourself in other men doing it, and in the few times you have done it yourself? A. Well, my main experience has been in my own control of the derrick.

Q. Then you have not gathered any of the information from seeing other men do it? A. Yes, sir.

Q. Then my first question is correct; that is, what you know about it is gathered from seeing others do it and the few times you have done it yourself? A. Not a few times; all my life.

Q. You haven't been doing that all the time, have you? A. No, sir; but there is never a day but what I have.

Q. I thought you said a moment ago it was a few

times? A. Off and on on every job. There was never a job but that I did that lots of times.

Q. I understood you to say a few times. But any way, it has been gathered from what you have done and seeing others? A. Yes, sir; my own experience and seeing others.

Q. You say the only safe way to do this is to have that lever? A. Yes, sir.

Q. How do you know that? A. By experience.

Q. Then as I understand, you have always used this lever? A. Yes, sir.

Q. You don't know how it would work with a rope —you don't know whether that would be safe or not? A. Yes, sir; I have had men rig derricks and try it until I got on the job and made them put it up right.

Q. And when you saw a rope used, you saw the man hold it and haul the boom up to keep it from swinging around, and you saw the rope worked in that way to keep the boom from swinging away from the mast? A. Yes, sir; if properly attended to.

Q. Mr. Gedney, when one of these stiff leg derricks is placed upon the edge of a building, as I have indicated, it is in plain sight, of course? A. Well, it is plain sight for everybody above.

Q. That is, it is in plain sight for everybody on the roof, if it is placed on the roof? A. Not altogether. There may be some obstructions of walls or something that he might not be able to see it until it got within four feet of him.

Q. If there was no wall; if a man was standing on the edge of the roof, and the derrick was south of him four or five feet, there is no reason why he couldn't see it, is there? A. No, sir; but a man as a rule is not always looking for that derrick.

Q. Given the set of circumstances I have described, could he see it? A. If he was not attending to any other business.

Q. If he could look at it he could see it? A. Yes, sir.

Q. There is nothing in the circumstances I have described that would keep him from seeing it, if he could see it? A. No, sir.

Q. The signals you speak of refer to the men on the ground, out of sight of the derrick, don't they? A. Not altogether, no, sir; that signal is made so anybody about the building, as well as the derrick, will know it. It is a warning to everybody.

Q. Did you ever have a derrick situated like this one was, as we have described it to be? A. Yes, sir.

Q. If a man was standing on the edge here, when the derrick had been working continuously back and forth every fifteen minutes all day, all week, or all month, you don't warn him, do you? A. Yes, sir.

Q. Do you think it necessary to warn that man when he has stood there and seen that bucket brought up and swung out every fifteen minutes for a month? A. I do.

Q. Do you warn him? A. I do.

Q. How do you if you do? A. By some signal from the man stationed at the derrick.

Q. What is the signal? A. That may be governed by any code of signals. It is generally a whistle.

Q. Suppose a man would push that bucket out and shout "Look out below," or "Here she comes," loud enough for a man down here on the ground, forty-two feet, to hear him, wouldn't you think, as a man of ordinary sense, that a man five feet from him could hear him? A. No, sir. There may be a dozen different workmen that would use the same call. If a little brush of dirt brushes over, that is the first thing they say.

Q. Providing that signal was often used for other purposes, a man might not pay attention to it? A. No, sir.

Q. Supposing that signal was not used for anything else except to warn those men on the ground to look out for the bucket? A. That could not be done.

Q. You mean that is not done with your work? A. No, sir.

Q. You don't know that it was not done here? A. No, sir.

Q. Suppose the facts are as I have described them to be; that that was the only purpose for which that signal was used, to warn the men below to get ready to receive the bucket and fill it again, wouldn't you say that

if the warning back here was loud enough for the man forty-two feet below to hear it, that a man five or ten feet from the edge of the wall could hear it? A. He may hear it, but those same words are hollowed forty times a day.

Q. Suppose there is no yell at any other time. Suppose the only purpose for which it is given is to warn these men below? A. Yes, sir, if you could keep everybody's mouth shut and use it for that one signal, it would be all right.

Q. I say if that was the only purpose for which it was used? A. Yes, sir.

Q. You think you could hear it? A. Yes, sir.

Q. There is no doubt about that? A. No, sir.

Q. None whatever, is there? A. No, sir.

Q. How often, in concreting a roof, would a bucket of concrete three feet in diameter and three feet deep be raised? A. That would depend, of course. They may be every three minutes, or five or ten.

Q. Anywhere from three to ten minutes? A. Yes, sir.

Q. That is your experience? A. Yes, sir.

Q. That is true? A. Yes, sir.

Q. Those buckets are hoisted up full of cement once every three to ten minutes, between those periods of frequency? A. Yes, sir.

Q. They were swung out just as many times? A. Certainly, yes, sir.

Q. Then, as a rule, you put the derrick on the edge to hoist up material? A. In most cases we do. That is owing to circumstances.

Q. After having had all that experience, you still maintain that using a rope attached to the end of a boom, and having it handled properly, will serve to stop that boom on the swing just as satisfactorily as using a lever? A. Oh, no.

Q. I understood you to say that. A. No, sir, I say it will stop it, maybe, in ordinary weather.

Q. Providing there is no wind? A. Yes, sir.

Q. Using a rope attached to the end of the boom, handled properly, will stop the boom on the swing out, providing the climatic conditions are correct, just as

satisfactorily as a lever, with the exception that it will not control it on the swing as satisfactorily as a lever? A. No, sir. It will not control it as satisfactorily in any way at all.

Q. You can stop it, can't you? A. Yes, sir.

Q. You can stop it just as satisfactorily as you can with a lever, can't you? Isn't that a matter of common reason, that by holding on to the end of a rope, with the boom moving away from you, you can stop it on the swing out just as satisfactorily as you can with a lever, and even more so, can't you? A. No, sir.

Q. Can you stop it as satisfactorily? A. No, sir, I say you can't.

Q. With the weather conditions satisfactory? A. In stopping a boom you may stop it ordinarily, but the swing would have a tendency to bring it back the other way again. You may stop it that way, ordinarily.

Q. I am not talking about stopping it that way. That would be a foolish trick. You can stop it the same way just as satisfactorily as with a lever? A. No, sir, you can stop it, but not as satisfactorily.

Q. Can't you stop it in a gradual manner? A. No, sir.

Q. Why not, by letting out your rope? A. You can't do it. A man can't control a rope like he can a bar or big lever."

STEPHEN J. HAYDE, who was another expert witness for the plaintiff, testified as follows: (Page 8 to 80, Rec.).

"Q. State your name, age, residence and occupation. A. My name is Stephen J. Hayde: my age is forty-three; my residence is Kansas City, Missouri; my occupation is building and contracting.

Q. How long have you been in the building and contracting business, Mr. Hayde? A. Twenty-two or three years.

Q. During that time have you had any occasion to use derricks in the construction of buildings? A. Yes, sir, we use derricks a good deal in our business.

Q. Are you familiar with the construction and operation of derricks used in the construction of buildings? A. Yes, sir.

Q. To what extent are you familiar with them? A. Well, to the extent of having made and built what I consider good derricks.

Q. Do you know how a derrick should be constructed?

By Mr. Hogsett: I object to that, unless counsel will state what kind of a derrick he means.

Q. Well, generally, do you know how to construct derricks? A. I can build derricks to suit myself, yes, sir.

Q. What class of buildings have you costructed, Mr. Hayde, mostly? A. Well, mostly what would be considered in Kansas City heavy buildings.

Q. Have you had occasion to use derricks on all those buildings? A. I think so. I don't know of any that we didn't.

Q. Were you familiar with the practical operation of the most of those derricks? A. I would like to have you explain what you mean by that question, Mr. Turpin.

Q. Did you know, in most of those cases, about what kind of derricks they were and how they were operated? A. Yes, sir, in a general way. I didn't spend my time watching them being operated.

Q. What is a stiff leg derrick, Mr. Hayde? A. Well, a stiff leg derrick is a derrick made of, you might say, five pieces of timber, a mast and two stiff legs, practically forming two triangles, with the mast making the vertical side to the triangle. Then it has a boom which is coupled at the base of this mast, which drops at an angle of whatever degree you want to call it. That is raised and lowered as you see fit, to give you greater reach, or less as you may want to handle it. Then that is operated with a rope that runs through by the mast and out through the shoe and attached to the engine. Sometimes a stiff leg is handled with what you call a crab that is lashed to the mast, and operated with a windlass by hand. They are not always operated by steam.

Q. If what is known as a stiff leg derrick is placed

at the top of a building for the purpose of raising material for work on the building, and the material is hoisted in a bucket or tub attached to a rope run through the derrick and attached to an engine which furnishes the power for hoisting the bucket, and the derrick swings out over the outside of the wall of the building and is then raised by the engine, and is then swung around so that the bucket may be dumped at a convenient place on the building, what is the usual method of moving and swinging and controlling the boom of such a derrick so as to swing the boom of the derrick and the bucket in to place the material, and out to place the bucket on the outside of the wall.

By Mr. Hogsett: The question is objected to for the reason that the witness has not shown himself competent to testify on that point.

The Court overruled the objection.

A. With a hand lever clamped to the mast of the boom."

At the conclusion of all the evidence, as before stated, the defendant interposed a demurrer to the evidence. (p. 88, Rec.) and that demurrer was sustained by the court, and plaintiff excepted. (pp. 88-89, Rec.)

Plaintiff sued out a writ of error and citation to the Circuit Court of Appeals. (pp. 1-2-3, Rec.) Plaintiff also filed in the Circuit Court, at the time of suing out the writ of error, a petition for said writ praying for the issue of said writ of error, together with an assignment of errors. (pp. 89-90, Rec.)

The judgment of affirmance of the Court of Appeals may be found at p. 100 of the Record.

The opinion of the Circuit Court of Appeals may be found from p. 95 to p. 100 of the record.

As will be seen from the opinion of the Circuit Court of Appeals, there was and is no dispute about the facts of this case, and the question decided by that Court was whether, as a matter of law, the Circuit Court did

or did not err in sustaining the demurrer of defendant to plaintiff's evidence, and in holding that, as a matter of law, there was no liability on the part of the defendant to the plaintiff in this case on the conceded and undisputed facts therof. We will notice the opinion of the Circuit Court of Appeals hereafter in our brief and argument. Petitioner and plaintiff contends that the opinion of the Circuit Court of Appeals in this case and the rule by which it adjudges and determines this case, is contrary to the rule recognized and heretofore announced by the Circuit Courts of Appeals in other circuits, and also is contrary to the rule which obtains in the state appellate courts, and that the rule of this case practically stands alone and by itself.

The importance of the question does not arise from its effect in the decision of this case alone, but results from its relation to and effect upon thousands of employes throughout the United States who are engaged in separate departments and in separate gangs, in the construction of large buildings being constructed in the different cities of the United States.

In the presentation of the petition for the writ of *certiorari* in this case, petitioner set forth two grounds. First, that the judgment of the Circuit Court and the judgment of the Circuit Court of Appeals in this case were erroneous because there was no jurisdiction in the Circuit Court on the removal by the defendant in this case, for the reason that, as appears from the record and the removal petition of the defendant, plaintiff was and is a citizen of Missouri and the defendant was and is a corporation created under the laws of New Jersey, and that, neither of the parties being a citizen of Kansas, this case was not removable from a state court in Kansas to the United States Circuit Court for the District of that State. The petition for the *certiorari,* so far as it

proceeded upon that ground, was based upon the decision of this Court in the case of Wisner, 203 U. S., 449. At the time the petition for the *certiorari* was presented and at the time the *certiorari* was granted by this court. this court had not given its decision in the case of *In re Moore,* which was decided by this Court at the last term.

In the case at bar, the plaintiff and petitioner Kreigh made no objection to the removal and did not raise the question of jurisdiction of the Federal Circuit Court until it was raised on the petition for *certiorari* herein. What is said in the petition for *certiorari* upon this ground, commenced at p. 1 and extends to p. 10 of that petition. In view of the decision of this Court in the Moore case, we do not renew this point as a ground of reversal. Understanding, as we do from the Moore decision, that this Court decided finally that in cases of this kind, the objection on the ground of jurisdiction is waived by not making the point of jurisdiction in the Circuit Court or in the Circuit Court of Appeals, we therefore do not ask the Court at this time to review or consider this question of jurisdiction as presented from p. 1 to p. 10 of the petition for *certiorari.*

Upon the other ground, however, that on the merits the action of the trial court in sustaining the defendant's demurrer to the evidence was erroneous, and was contrary to the decisions of other U. S. Courts of Appeal, we call attention to the argument and authorities which are contained in our petition for the *certiorari,* from p. 10 to the conclusion thereof.

This statement of the case will be followed by a specification of the errors, and then by a brief and argument. The brief and argument in this paper book will be in some degree a resume of what is contained in the argument and citation of authorities in our petition for

the *certiorari,* from p. 10 to the conclusion thereof. One or two of the points that we rely upon are more fully set forth and presented in the brief and argument in this paper book than in the brief and argument and citations of authorities in the petition for the *certiorari.* And we beg the consideration of this Court to take on this submission what is said in our argument and citation of authorities from p. 10 to the conclusion thereof, in our *certiorari* petition, and also the brief and argument in this paper book.

SPECIFICATION OF ERRORS.

Said plaintiff and petitioner assigns the following errors of the Circuit Court and of the Circuit Court of Appeals in the determination by them of this case:

1. Said Circuit Court erred in sustaining defendant's demurrer to plaintiff's evidence and in directing the jury to return a verdict for the defendant.

2. Said Circuit Court erred in taking the case away from the jury and in giving judgment for the defendant against the plaintiff.

3. Said Circuit Court erred in not submitting this case to the jury for their determination, under proper instructions from the Court.

4. Said Circuit Court erred in holding that plaintiff had not introduced sufficient evidence to show *prima facie* that he was entitled to recover in this action.

5. Said Circuit Court of Appeals erred in overruling the errors assigned by plaintiff and petitioner.

6. Said Circuit Court of Appeals erred in giving its judgment of affirmance in favor of defendant and against plaintiff and petitioner.

Petitioner prays this Court to reverse the judgments of both lower courts and to remand the case for a new trial.

This court will not consider the mere application of settled principles of law to the facts peculiar to a particular case, the importance of which is limited to the litigants engaged in it or to a small class of litigants, yet rules of law must be evolved from facts and the far reaching effect of this decision and its wide-spread importance can be appreciated only by a consideration of the facts shown by the evidence in this case together with the declarations of law made by the Court of Appeals in its opinion. We, therefore, ask this court to consider a full analysis of the opinion of the Circuit Court of Appeals in this case in connection with the facts from which that opinion is evolved. That analysis will show that the application of this opinion to the facts of this case establishes a rule of law that is not only unsound but is at variance in effect with that in force in every other jurisdiction so far as we know. It must be conceded that the place where plaintiff was working along the north wall of this building was made dangerous by the operation of the derrick and the swinging of the concrete bucket across the top of the building. The fact that plaintiff was struck by the bucket while he was attending to his duties as foreman of the bricklayers in the usual and ordinary method of performing those duties and was knocked off of the building is undeniable proof that the place was dangerous. This does not seem to be questioned by the Circuit Court of Appeals in its decision. Neither is it denied that this danger could have been avoided by the use of usual and customary provisions for safety.

The undisputed evidence shows that the danger to which plaintiff was exposed was one not necessarily attendant upon the work he was performing. The evi-

dence of a number of experienced builders shows that there are two usual and customary appliances for controlling the movement of a derrick such as was used on this building so that the boom of the derrick and the load which is carried by it may be moved slowly and evenly and be kept under strict control throughout its course over the top of the building. One of the appliances in common use is a lever attached to the mast of the derrick by which the mast may be turned and the boom swung around with its load by a man stationed at the mast. The other appliance in common use is a double set of ropes attached to the end of the boom of the derrick. This double set of ropes consists of one rope used to pull the arm of the derrick in one direction and another rope used to pull it in another direction. The rope used to pull the arm in one direction is also used to steady its motion when it is being pulled in the opposite direction by the other rope. These two ropes may be operated by a man at each rope or one of them may be run through a pulley attached to a post in such a manner that one man may operate both ropes. It was shown to be the general and universal custom to use either the one or the other of these appliances on derricks situated upon the top of buildings. The derrick in question was not supplied with a lever and was supplied with only one rope to pull the arm of the derrick with the loaded bucket from the outside of the north wall of the building to the platform on top of the building where the concrete laborers were at work. The necessary method of operating the derrick thus equipped was to send the bucket out by the impetus of a violent shove. The one rope supplied could not be used to steady the bucket or to control its movements on its outward course because if it was held tight enough to afford any control of the bucket it would retard the force given by

the shove so that the bucket could not be made to go over the north wall of the building. To operate this derrick by the force of a shove it was absolutely necessary that the bucket be sent flying across the top of the building at a rapid rate of speed or the bucket would stop before it got over the edge of the building. The evidence further shows that in operating derricks on buildings it is usual and customary to provide and establish a system of signals that will warn everyone on the building that the derrick is about to be put in motion. The defendant provided no system of signals, no system of signals was used and no signals were given.

As we observed before, it can not be denied that the operation of this derrick without these precautions was dangerous to anyone who should work along the length of the top of the north wall of this building. The Court of Appeals held that defendant owed no duty to its employes to make this place safe, and, therefore, defendant "was guilty of no *actionable* negligence," (Record, 99), in not making provision for the safety of this place, and the court made the following statement as the law governing the case:

"Negligence is a breach of duty. Where there is no duty or no breach, there is no negligence. An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury which could not have been forseen nor reasonably anticipated as the probable result of an act or omission is not actionable, and such an act or omission is either the remote cause or no cause whatever of the injury."

No exception is taken to this as a declaration of law. The error lies in holding that it is applicable to the facts of this case. The evidence in this case shows a breach of duty by the defendant and therefore negligence. The plaintiff's injury was the natural and probable consequence of an act of negligence and is there-

fore actionable because it could have been forseen and reasonably anticipated and was the probable result of the act and omission of defendant. Such act and omission was the direct cause of plaintiff's injury.

The rule which governs this case was declared in the opinion of this court by Mr. Justice Brewer in Balti*more & Ohio Railroad Company* v. *Baugh,* 149 U. S., 368, l. c. 386. It is stated as follows:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery, owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."

The next statement of the learned Court of Appeals in connection with the facts of this case is:

"If the defendant had directed the plaintiff to work in the path of this bucket, if he could have performed

his service in no other place, and if in the discharge of his duty he could not have forseen or protected himself against its approach, it might have been the duty of the defendant to establish a code of signals and to so construct the derrick that the bucket could not have struck him unawares and this because his injury might have been reasonably anticipated from a failure to exercise such care." (Record, 98.)

The Court of Appeals was in error in holding that defendant had not directed the plaintiff to work at the place where he was when he was struck by the bucket. Plaintiff was employed as foreman of a force of bricklayers and hod carriers and was directed to construct the brick work for this building. Defendant in carrying out the plan of the building had constructed a steel frame for the support of the building. Defendant had directed plaintiff to build brick "curtain walls" over this frame work and to construct the other brick work shown on the plans of the building. A considerable part of this brick work had been constructed by plaintiff and his force of men prior to plaintiff's injury. Plaintiff was directed by Mr. Clem, the general Superintendent of Construction, to build these "curtain walls" over the steel frame of the building and when that direction was given it carried with it the further direction to go wherever it should become necessary for him to go in the prosecution of his work. In building these walls it was absolutely and unavoidably necessary for plaintiff to go upon and along the top of the steel frame work at its north edge and he could have performed the duties in which he was then engaged at no other place than on top of the building. When defendant directed him to build the wall it knew that he must go there when the brick work should reach the stage of construction which it had reached on the day of his injury. Plaintiff was as certainly and effectually directed to go to this place as if he had gone

there in immediate obedience to a specific instruction. The general instruction to perform work that necessarily took him there was equal to a specific instruction to go to that particular place so far as defendant's obligation to keep that place safe is concerned. In this connection it must be borne in mind that the danger surrounding this place did not arise from a sudden contingency but it began when the derrick was erected and continued so long as the derrick was used. The plaintiff was led by his duties into a place made continuously dangerous by a lack of provisions then unknown to him. He did not go to this place at a particular time of peril but he must encounter this continuing danger whenever his work should lead him there.

The Court of Appeals also argued in its opinion as follows:

"But the plaintiff was free to discharge his duty of superintendence at any place on or about the building. He could have performed it as efficiently without, as within the track of this bucket." (Record, 98.)

This is another erroneous conclusion of the learned Court of Appeals. The work of building a scaffold sixty feet along the north side of the building naturally required the presence of the plaintiff, as the superintendent of that work, all along that sixty feet and at every point in that sixty feet. The learned Court of Appeals seems to assume that the plaintiff was engaged in the construction of the scaffold in question at the point where the bucket went over the building, and at no other point. As we have seen, the plaintiff's duty required him to work all along the sixty feet, and of course it was his duty to be at all points of that sixty feet.. The undisputed facts show that the bucket moved in a circle, both in being carried around by a movable boom over the building to the point where the bucket was emptied, and

in the moving of the bucket back from the point where it was emptied out over the building. And since on the conceded facts the bucket moved in a circle each way, and its course was in no way marked, nobody could know with certainty where the bucket would pass over the outer wall. And if before the brick men reached the top of the building they knew or might have known that the bucket was carried up over the building, they did not know and could not know of the course of the bucket over the top of the building, and they had a right to assume that the bucket was being moved by a lever or by guy and ropes, so as to control the movement of the bucket, and that warnings and signals of the movement of the bucket would be given.

The Circuit Court of Appeals for the seventh circuit has passed upon this identical question in *Louisville & N. R. Co.* v. *Ward*, 61 Fed., 927; 10 C. C. A., 166. That Court said:

"It was a duty which, under implied contract, the railroad company owed to the switchman, to keep the yard and tracks where he was employed to do his work —hazardous enough under the most favorable conditions—in a reasonably safe condition; and if the trackmen to whom the discharge of that duty was intrusted negligently left in the track, and between the ties, which they had recently been ballasting, a dangerous hole, which caused the injury complained of, their negligence was attributable to the plaintiff in error, and the case was properly submitted to the jury without reference to the question of responsibility for injuries caused by fellow-servants."

"The court was asked, and refused, to give the following instruction:

' "If you believe from the evidence that the plaintiff voluntarily selected and chose the place where he went in between the cars to make the coupling, when, if he had desired so to do, he could have selected another place to make the coupling, then he cannot recover." '

"There was no error in refusing this, and another instruction substantially like it, because they left out of view the inquiry whether the plaintiff knew, or ought to have known, of the danger incurred by making the attempt where it was made."

This decision in the seventh circuit is supported by the better reasoning.

If the system of double ropes had been used the outside rope would have indicated the path of the bucket over the wall. If a system of signals had been used and the derrick had been supplied with the usual appliances so that it could have been moved slowly and evenly across the building, plaintiff would have heard the signal, would have known of the approach of the bucket and would have been able to get out of its way.

By omitting the word "if" where used, and substituting the word "was" for the words "might have been," the language of the Court of Appeals is made to read as follows:

The defendant had directed the plaintiff to work in the path of this bucket, he could have performed his services in no other place, and in the performance of his duty he could not have forseen or protected himself against its approach, and it was the duty of the defendant to establish a code of signals and to so contruct the derrick that the bucket could not have struck him unawares and this because his injury might have been reasonably anticipated from the failure to exercise such care. (Record, 98.)

As thus changed it is applicable to the facts of this case.

In its opinion the learned Court of Appeals said:

"Neither he (plaintiff) nor any one except the roofers, had been at work or moving about upon the top of the building for several days, and no one could have

reasonably anticipated that he would suddely rise above the roof and station himself upon the plank in the path of the bucket without notice to its operators and without watching for its approach. His injury was not the natural or probable result of, and it could not have been anticipated from, the lack of a code of signals, when there had been no one on the building to signal to for days; nor from the lack of a lever on the derrick with which to swing the boom, nor of a guy rope on the north side to draw it across the wall. As the accident could not have been foreseen to be the natural or probable result of the failure to provide signals, lever or guy rope, the defendant owed the plaintiff no duty to do so and was guilty of no actionable negligence."

In the foregoing portion of the opinion of the learned Court of Appeals, we think there is manifest error. The learned court erred in the conclusion stated, that the defendant could not anticipate from the undisputed facts of the case that the plaintiff might be where he was at the time of the injury. The learned Court of Appeals, in more than one place in its opinion, concedes that if the defendant should have anticipated that the plaintiff, in the discharge of his duty during the progress of the work, might come and be on the roof where he was struck and injured, then it was the defendant's duty to have provided means for the protection of plaintiff against the danger which resulted in the injury. Thus in the opinion of the learned Circuit Court of Appeals at another place, that court said:

"It might have been the duty of defendant to establish a code of signals and to so construct the derrick that the bucket could not have struck him unaware, and thus his injury might have been reasonably anticipated from a failure to exercise such care."

It is thus seen that the learned Court of Appeals, in its very able opinion, concedes the rule to be that if the defendant should have anticipated that plaintiff

might in the discharge of his duty in the progress of the work, come where he was struck and injured, then it was the duty of defendant to provide against that danger to plaintiff and that injury, by providing a system of warnings or a code of signals and by a proper construction of the derrick. The Court errs in its assumption that the defendant in this case could and should not have anticipated that the plaintiff might, in the course and discharge of his duty, come to the place where he was struck and injured. As a matter of law, this conclusion is erroneous. The progress of the work on the building in question, at the time of plaintiff's injury, shows that the defendant should have anticipated the presence of the plaintiff on top of the building at or about the time of his injury.

As we have seen, the building in question was constructed of iron or steel frame, with brick walls. The building was 140 feet long, 50 feet wide and 42 feet high. At the time of plaintiff's injury the brick work in the wall on the north side, which was being carried on under the superintendence of plaintiff as foreman of the brick-layers and hod-carriers, had reached up to a point 35 to 39 feet high. The top of the north wall was within about six feet from the top of the building. Plaintiff testified as follows: "The brick work on the north was from 35 to 39 feet high." (p. 24, Abs.) So that it is thus seen that the brick work had nearly reached the level of the top of the building where the derrick was situated and the concrete work was going on.

Again, at page 25, plaintiff testified as follows:

"Just previous to the accident, probably a day, we had done some work on the east end of the building, and at the time of the accident was working on the north wall along near the east end."

It thus appears that the brick-layers under plaintiff's control were working on the brick wall on the north side of the building along under the point where the concreters were at work with the derrick. As the brick work thus approached the top of the building it became necessary to construct an additional scaffold, and it was in directing the work of building that scaffold from the top of the building that the plaintiff was engaged at the time he was injured; and in order to properly build that scaffold it was necessary, as will be seen, that plaintiff should be on top of the building with the men of his gang who were engaged with him in the construction of that scaffold. At the time the plaintiff was struck by the bucket, he was looking north. In testifying how he came to be there on the north wall of the building above his brick-layers, and why he was there, plaintiff gave the following testimony. (pp. 25-26, Rec.):

"Q. What were you doing there, why were you there? A. I was there directing some laborers in the building of the scaffold, getting ready for the (—) brick-layers on top, so as they could reach down and get this wall up.

Q. What kind of laborers were they? A. They were hod-carriers.

Q. What department of work were they engaged in? A. They were in the brick gang. They were my laborers, and what I would term scaffold laborers, scaffold builders. They were the laborers I would take out of the rest of the hod carriers, to build the scaffold.

Q. Where were these brick men working? A. The rest of the gang besides the men I had on top?

Q. Yes. A. They were down below, they were underneath. They were all bunched—some of them were right immediately under the board I was putting down. This scaffold run along there about sixty feet, I think. However, some of them were further on towards the west end, finishing up some work there."

It thus appears that at the time plaintiff was struck by the bucket and thrown off of the building down 42 feet, he was engaged in the absolutely necessary work of building the scaffold on which he and a portion of the hod-carriers were then engaged, so that the brick-layers who were still working right underneath him near the top of the building, might have this new scaffold on which to work, as they were nearing the top of the building. Of course, the defendant, who had the contract for the erection of the entire building and for that purpose employed the concrete workers in the one gang and the plaintiff and the hod-carriers, and the brick-layers in another gang, knew, or must be taken to have known, of the stage of the construction of the north wall, at the time of plaintiff's injury. To state it otherwise, the defendant was bound to know when it put up the derrick in question, that during the work of the concrete gang the plaintiff and his brick men would be doing, about the time, and in the manner and place in which they did it, the precise work which the plaintiff and his brick men were doing about and at the time of plaintiff's injury, and the progress of the brick work on the day plaintiff was injured indicated that the time had arrived when the whole force of bricklayers would soon be on the top of the building and that plaintiff on that day would be required to go on the top of the building and to be along the top of the building the whole length of it, including the point where the derrick was engaged. The evidence showed that this scaffold was to run along the building about sixty feet. The scaffold which the plaintiff was putting up was not to be, as the learned Court of Appeals seems to have thought, a scaffold at the precise point where the bucket customarily went over the wall, and nowhere else. The scaffold was to go along the length of sixty feet along the north side of the building.

The learned Court of Appeals in its opinion admits that "The plaintiff was free to discharge his duty of superintendence at any place on or about the building." It seems to us that this admission of the Court destroys the force of its contention and argument that the defendant should not have anticipated the danger to plaintiff which caused his injury. Who could better know or anticipate the progress of the brick work and the different stages of the different work on the building, and when it would be necessary for the plaintiff and his men to be on the top of the building to complete their work, than the defendant in this case who had charge of the entire building and of each department of the work and of all of the different gangs engaged in the work on the building?

This part of the opinion of the learned Court of Appeals can not be reconciled with the decision of this court in *Union Pacific R. R. Co.* v. *McDonald,* 152 U. S. 262, in which this court approved the opinion of the Supreme Court of Michigan in *Powers* v. *Harlow,* 53 Michigan, 567. That was an action by an infant to re-recover damages for injuries received while he was on the premises of the defendant, a small parcel of which was under lease to the boy's father. Defendant's servant placed a box of dynamite exploders in a shed; the shed was distant from any public highway, but of the several parcels of land leased by the defendant the one leased by the plaintiff's father was nearest to the shed (within ten rods or less) and to the farm road used by the defendant's lessess in reaching the parcels respectively cultivated by them. Chief Justice Cooley in delivering the opinion of the court said:

"The tenant was a laboring man, apparently of small means, and it is cutomary for such men to be assisted in their manual labor by the members of their families, and the defendant must have understood that the persons

who rented of him these small patches of land would be likely to avail themselves of the services of their children in cultivating them."

Certainly the defendant in the case at bar had as much reason to understand that these brick men would work along the top of this building as did the proprietor of that land to understand that his tenant would take his children to the parcel of land rented by him and that one of them would wander off to the shed where the exploders were stored.

In *Collust-Parrott Mining & Smelting Co.* v. *Monahan,* 162 Fed. Rep., 276, in an opinion rendered May 25th, 1908, the Circuit Court of Appeals for the ninth circuit passed upon a similar question. The facts of that case will appear from the following excerpt from the opinion:

"The defendant in error was an employee of the plaintiff in error, and as such was sent by the company to the roof of its storehouse to do some work, where he slipped, and, in falling, caught hold of a live wire, which inflicted the injuries for which he sued and recovered a verdict and judgment for damages in the court below. The case is brought here by the defendant below.

"The plaintiff alleged in his complaint that the defendant negligently and intentionally permitted the roof of its storehouse to be unsafe and dangerous to all persons going thereon, in that it negligently and wantonly permitteed a certain copper wire, insufficiently and carelessly insulated, carrying and charged with dangerous currents of electricity, to-wit, 2,500 volts, to hang and remain at a distance of only four feet above the roof where the plaintiff was sent and put to work by the defendant; that at the time defendant strung the wire so insufficiently insulated defendant knew that the plaintiff and other of its employes would in the course of their employment likely go upon the roof and would be likely to come in contact with the wire, and be thereby killed or receive great bodily injury; that the pretended insulation of the

wire was weatherproof only, and was not designed to protect human beings, and was insufficient for the latter purpose; that for a long time prior to the plaintiff's injury the defendant well knew that at the place where the plaintiff touched the wire it was not insulated, and yet permitted the same to hang about four feet above the roof."

The court in its decision said:

"And it was bound by the plainest principles of law and justice to properly insulate its wire, to the end that those likely to come in contact with it should not be injured."

Continuing the Court said:

"There could have been no better evidence of the improper insulation of the wire in question than the shock the plaintiff received from touching it. At points or places where people have the right to go for work, business, or pleasure, the insulation and protection should be made as nearly perfect as reasonably possible, and the utmost care used to keep them so."

It will be observed that the occasion to go upon the top of the roof of that building was not so certain to occur as it was in the case at bar.

We might cite other cases showing that the decisions of the Court of Appeals in this case on this point is not in harmony with the decisions in other jurisdictions, but we deem it unnecessary.

We submit that both upon reason and authority it must be held that plaintiff's injury was the natural and probable result of and should have been anticipated from the lack of a code of signals and the lack of a lever on the derrick with which to swing the boom or of a guy rope on the north side to draw it across the wall. And as the accident could have been foreseen to be the natural or probable result of the failure to provide signals, lever

or guy ropes, the defendant owed the plaintiff the duty to do so and was guilty of actionable negligence.

The Court of Appeals lays much stress upon the fact that plaintiff did not notify the roofers of his presence. The learned Court of Appeals said: "No one could have reasonably anticipated that he would suddenly rise above the roof and station himself upon the plank in the path of the bucket without notice to its operators." (Record, 99). And in another part of the opinion it is said: "There is no evidence that he attempted to notify the roofers of his presence or that they were aware of it." (Record, 98.) We do not understand how the duty of defendant in constructing this derrick and in its provision for signals and warnings, could be affected by the question whether the plaintiff or any other of the brick men notified the concreters of their presence. Why should such notification have been given? The defendant was bound to assume that as the brick work approached the top of the building, the plaintiff and his brick men would be just where the plaintiff was at or about the time of his injury. But, we repeat, it is not seen how the duty of the defendant in the construction of the derrick and provision for signals and warnings could have been affected by the question whether the roofers were notified or actually knew of the presence of plaintiff or of his brick men. The knowledge of the roofers of his presence might possibly affect the question of the negligence of the roofers, but we are not counting in this case upon their negligence but upon that of defendant, in the construction of the derrick and its failure to provide for signals and warnings.

The case of *Lang* v. *Terry*, 163 Mass., 138, is in point here. The court in that case said:

"At the time of the acicdent plaintiff was engaged in the performance of his duty, putting some boards over

an iron casting on the deck, near the bow of the boat in accordance with the direction of the captain. He was struck by a swinging spile, which was hoisted by a derrick and steam hoisting engine for the purpose of being transferred from a steam barge to the barge on which he was morking. The spile was hoisted and swung around without the use of a guide rope. It appears that he could have seen the spile before it struck him if he had been looking for it, and he testified that he knew they were going to lift the timber when they got ready and everybody was out of the way; but he did not suppose they were ready to start when they did. There was evidence that a warning was given him to look out just as he was struck, but not in time to enable him to avoid the swinging timber.

"We are of opinion that it was a question of fact for the jury on the evidence, whether the plaintiff had such reason to expect the hoisting of the spile without warning, and the swinging of the spile in a dangerous way, as to require him in the exercise of ordinary care to watch the operation of the hoisting engine and look out for himself. They might think that he had reason to expect that the spile would not be hoisted while he was at work over the grating without first giving him warning, or that it would not swing in such a way as to strike him."

Futhermore, in holding that it was plaintiff's duty to notify the concrete men that he was going on the top of the building the Court of Appeals seems to assume that plaintiff knew of the danger to which he was exposed. This assumption is not based on any evidence in the case. The undisputed evidence shows and it must be conceded that plaintiff did not know of the danger to which he was exposed. He did not know that the derrick was not supplied with the devices and appliances in common use for the protection of employes; he did not know that no system of signals had been provided; he did not know that no provision had been made for giving the necessary warning to those who should work

upon the top of the building and that the protection of other employes from this danger was left entirely to concrete roustabouts so engrossed in their other duties that they could not properly and efficiently give the necessary warning.

The following language of Judge Dallas in *Newark Electric Light & Power Co.* v. *Garden*, 78 Fed., 74; 23 C. C. A., 649, is applicable to the facts of this case:

"There was nothing in the surroundings to inform him that he ought not to go there, nor that he would incur any risk if he did. * * * * * And in placing himself where and as he did, this man was doing his work as one of the witnesses said, 'the same as any man would do that works at the business;' and common sense and humanity demanded, as we think, that while so working his life should not have been put in jeopardy, we do not say by a trap, for there was no purpose to ensnare, but by the unknown and invisible peril, to which he might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him. * * * * * It offered an obvious, and, seemingly, a protected standing place. 'There was nothing to warn either child or adult that it might not be so used. *Schilling* v. *Abernathy*, 112 Pa. 437. It was therefore 'liable to the incursions of * * * even grown men,' not 'from thoughtlessness, accident, or curiosity, merely, as suggested in *Hydraulic Works Company* v. *Orr*, 83 Pa. 332, but in the prosecution of their legitimate calling.' "

Not only was plaintiff ignorant of the defendant's failure to provide for his safety but the law cast no obligation upon him to become familiar with it. As was said by the Supreme Court of Michigan in *Swoboda* v. *Ward*, 40 Mich., 420:

"A person when employed and instructed to commence work at a particular place, as for instance in this case in a mill, is under no obligation, in order to protect himself from the charge of contributory negligence,

to first go all through the building, and make himself familiar with each piece of machinery and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for him that in entering upon the active discharge of the duties assigned to him, he ascertains what he is expected to do, and the danger directly connected therewith, and he has a right to assume that in the performance of that particular duty, reasonable facilities therefor will be afforded him, without coming in contact with other unforseen or unsuspected dangers."

The error of the Court of Appeals in holding that the duty of protecting plaintiff from this danger created by a lack of provision in another department of work devolved upon plaintiff and not upon defendant is made plain when we consider the opinion of the Circuit Court of Appeals for the second circuit in *Grace Hyde* v. *Kennedy*. That Court said:

"The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger." (*Grace Hyde Co.* v. *Kennedy*, 99 Fed., l. c. 682; 40 C. C. A., 69).

The next statement made by the Court of Appeals in support of its decision is a statement of principles of law wholly inapplicable to any facts appearing from the evidence in this case. The Court said:

"The rule of safe place is inapplicable to this case. The duty of construction and provision is the master's; the duty of operation and protection from negligent use is the servant's. The duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the machine shall become dangerous by their negligent use or operation is the duty of the servants to whom the use or operation is entrust-

ed, and is not any part of the positive duty of the master." (Record, 99).

The correctness of these propositions as general statements of the law, cannot be questioned. But they do not lead to the result adjudged.

The rule applicable to the facts of this case is found aptly stated in other decisions.

In *National Refining Co.* v. *Willis,* 143 Fed., 147; 74 C. C. A., 301, a scaffold fell by reason of the pressure of a jack operated upon it and the employee was killed. The Circuit Court of Appeals for the sixth circuit said:

"It is true that, if the scaffold was constructed for the sole purpose of holding the workmen and their tools, and during the progress of their work, because of an unexpected emergency, not within reasonable contemplation, was improperly used also as a foundation for the jack and its pressure, the negligence consisting solely in such use, no recovery could be had; for the negligence would be that of a fellow servant. In other words, if the scaffold was fit for the intended use, and was negligently used for an improper and unanticipated one, the company would not be liable. *Maxfield* v. *Graveson,* 131 Fed., 841, 65 C. C. A., 595, 598. But, on the other hand, if the scaffold was erected, not only for the purpose of holding the workmen and their tools, but also of serving as a foundation for the jack and its pressure, and through the negligence of Hummel it was not made strong enough, and broke, the company would be liable; for the duty to make it strong enough for both purposes, and reasonably safe, not only as a place to work, but as an appliance to work with, in erecting the roof, would be a positive one, which could not be delegated, so as to relieve the master from responsibility. *National Steel Co.* v. *Lowe,* 127 Fed., 311, 62 C. C. A., 229, 235; *Chambers* v. *American Tin Plate Co.,* 129 Fed. 561, 64 C. C. A., 129. If the jack supplied by the company through Hummel had proved defective and broken, and as a result a workman, without fault on his part, had been

hurt, the company would have been liable; for it was bound, as a personal duty, to furnish a reasonably safe appliance for raising and holding the rafters. The case of the scaffold, on which the jack rested, was in nowise different. It too, was an appliance for the same purpose and came under the same rule."

"Now, the question of fact as to the nature of the negligence which caused the accident, whether one of use or one of construction, was submitted to the jury under proper instructions, and the jury necessarily found that the negligence was in the construction, and not in the use, and that Hummel, as the direct representative of the company, should have anticipated the use and made the scaffold strong enough to bear it; negligently failing to do which, the company was liable. This disposes of the main question in the case, and furnishes the rule for the determination of the others."

In *Austin Manufacturing Co.* v. *Johnson*, 89 Fed., 6777, 32 C. C. A., 309, the plaintiff was engaged as a laborer in building a bridge. "In order to put the girders and floor beams in place, it was necessary to erect a scaffolding to give support to the beams while they were being placed in position and bolted together, and also to furnish a place whereon the workmen could stand, when engaged in putting together the framework of the superstructure. * * * The evidence further shows that on Saturday, a part of the iron framework of the bridge was placed upon the scaffolding, and thus remained during Sunday, and that, when the work of construction was resumed on Monday, it was found that the weight of the same hand caused the scaffolding to sink somewhat, so that it became necessary to raise up the ends of the floor beams already placed in position, and, while this was being done, the scaffolding fell down, carrying with it the portions of the superstructure resting thereon and a number of workmen who were standing on the scaffolding, including the defendant in error, who was badly injured."

Judge Shiras in delivering the opinion of the majority of the Circuit Court of Appeals for the eighth circuit said:

"Thus the scaffolding was being used to support the dead weight of the material placed on it, and also to aid in moving the beams into place, with all the additional strain caused thereby. If a derrick had been used to swing the beams into position while they were being bolted together, there could be no question that it would be an appliance, within the rule that requires of the master due care to supply proper machinery and appliances for the performance of the work at hand. The staging in this case served the same purpose, and therefore it can be fairly said that it was an appliance furnished by the master, to be used in getting the several parts of the superstructure into position and bolting them together. In view of the purposes to which this scaffold was to be put, and of the fact that the workmen had no control over the mode of its erection, the trial court rightly held that the defendant company would be responsible to the plaintiff, Johnson, for negligence in its construction." * * *

Continuing the Court said:

"The evidence showed that, when the staging was put to the use for which it was intended, it failed to stand the strain, and fell down, and the jury would naturally conclude therefrom that it had not been constructed in a reasonbly safe and proper manner; and, this conclusion being reached, then, under the instruction of the court, it became the duty of the jury to find for the plaintiff."

The learned judge who wrote the opinion in the case at bar dissented from that opinion and has for a long time adhered to a position which we think is against the great weight of authority.

The derrick boom and bucket, in the method of their construction and in the want of provision for signals and warnings, made the place where the plaintiff

was struck and injured, an unsafe place from the time the defendant placed the derrick, boom and bucket on top of the building. The assumption of the learned Court of Appeals, therefore, that the place where plaintiff was injured was until the moment of his injury a reasonably safe place and that he was injured solely by the collateral and independent negligence of the roofers at that instant of time while using properly equipped appliances in a safe pace is not borne out by the facts. It was an unsafe place from the start, and the danger which caused plaintiff's injury did not arise from the negligent use by defendant's servants of a properly constructed derrick, boom and bucket, but arose from the use, in accordance with its design, of an improperly constructed derrick, boom and bucket from the commencement of its use. There can be no claim, properly made, that the servants of defendant in charge of the derrick used the derrick, boom and bucket otherwise than was contemplated by defendant it should be used in carrying on the work with the derrick.

No question arises in the case, nor can arise, between a proper and an improper use by the roofers, of the derrick, as constructed and provided by the defendant. The derrick, boom and bucket, as constructed by the defendant, and the want of provision by defendant of signals and warnings, made the place where plaintiff was injured an unsafe place from the beginning, and the danger was not made by any independent negligence of the fellow servants of plaintiff considered separate and apart from the improper construction of the derrick, boom and bucket and the want of provision of signals and warnings. Possibly the fellow servants of an injured employe may be said to be guilty of negligence with the negligence of the master, where those fellow-servants use an improper and defective appliance; but

the rule is a well settled one that if the negligence of the master in failing to provide a sufficient or proper appliance and a safe place is a contributing cause of the injury, the fact that the negligence of fellow servants may also contribute is no defense. *Grand Trunk Ry. Co.* v. *Cummings,* 106 U. S., 700.

The next point made by said Court of Appeals in support of its decision, as will appear from the opinion of said court, (pp. 96-100 of the Record), is based upon an erroneous corollary drawn from a statement of a sound principle of law expressed in too broad terms by said Circuit Court of Appeals. The Court thus states the principle:

"The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety as the work progresses, is the duty of the servants to whom the work is entrusted, and is not the duty of the master." (Citing *Am. Bridge Co.* v. *Seeds,* 144 Fed., 605, 611, 613, a case decided by the C. C. A. of the eighth circuit).

The principle the court attempted to state must be stated and applied with great care. The language emplyed by the court is too broad in that it omits some necessary elements of the rule and includes cases that do not fall within it It thus extends the principle beyond the proper limits.

Where the servants engaged in a department of work themselves change the condition of the place where they are employed by the work they are doing and by that work create a peril by reason of which one of their number engaged in the same department of work is injured the master is not liable. (*Armour* v. *Hahn,* 111 U. S., 313). The reason of the rule is that the master should not be liable for an injury caused by the working place becoming "unsafe at the particular time of the

accident by causes that could not have been anticipated or by sudden exigencies created in carrying on the details of the work." (*Grace Hyde Co.* v. *Kennedy,* 99 Fed., 679; 40 C. C. A., 69). When the plan or method of doing the work directed by the master or any omission of the master creates a danger not necessarily attendant upon the work in which the servant is engaged the master is liable for the results of that danger although it arises in the progress of the work.

In *Woods* v. *Lindvall,* 48 Fed., 62, I. C. C. A., 37, the plaintiff was engaged in filling up a railroad grade with dirt to the level of a trestle. The trestle was supported by bents and by reason of the use of improper appliances for fastening the stringers of the trestle to the top of the bents the trestle fell and plaintiff was injured. Judge Caldwell in delivering the opinion said:

"Did the court err in refusing to instruct the jury at the close of the evidence to return a verdict for the defendants? The solution of this question involves the application of the law to the facts of the case. There is no room for controversy over the material facts upon which the case must turn. They are very fully set out in the statement of the case. There was abundant evidence to warrant the jury in finding that the trestle was constructed without a due regard for the safety of those who were to work upon it. It was not braced between the trestle legs; the stringers laid on top were not spiked to the caps of the bents; the ties and track laid on the stringers were not spiked to the stringers; there were no chucks on the stringers on either side of the caps; nor any bolts driven into them on either side of the caps. The evidence shows that the doing of one or more of these things was necessary to render the structure reasonably safe and secure. The only means used to hold it together was a rope tied by hand around the stringers and the caps at each trestle-bent. It is not claimed that the plaintiff was guilty of contributory negligence, or that he constructed or assisted in constructing the bents or trestles. He was employed by Murdock to work on

the dump,—that is, to dump cars, shovel dirt, and tamp the track; but Murdock could assign him to do any other work, and did require him to assist in raising trestle-bents when his services were necessary, and he was on the trestle by Murdock's order, assisting in raising a trestle-bent, when, without any fault or negligence on his part, the trestle upon which he was at work, by reason of its imperfect construction, fell and injured him.

"Are the plaintiffs in error chargeable with this faulty construction of the trestle, and liable to the defendant in error for the injury he sustained by reason thereof?

This question was answered in the affirmative and the judgment for the plaintiff was sustained by the Court of Appeals.

The reason fails and the rule does not apply to cases where one set of workmen during the progress of the work, create a dangerous condition and that condition is permitted to exist and another servant in a different department of work who had nothing to do with the creation of the dangerous condition and who had no knowledge of it is injured by it.

The Circuit Court of Appeals for the seventh circuit made this distinction in *Thompson-Starrett Co.* v. *Fitzgerald,* 149 Fed., 721, 79 C. C. A., 427. The Court said:

"The plaintiff in error, defendant below, was engaged as contractor in constructing a steel frame building. On the first floor a temporary platform had been made by laying boards across the beams. From this platform a hoist took bricks and other materials to the upper floors. Common laborers wheeled bricks along a runway from without the building to the platform, left there the loaded barrows to be hoisted, and went out wheeling the empty barrows that had been let down. Plaintiff, one of these common laborers, went to the side of the platform to get an empty barrow whose wheel

was over the edge, and fell into the basement, receiving the injuries complained of." * * *

"On the basis that defendant, as master, had undertaken to provide its servant a safe appliance in the performance of his work, a finding of negligence was justified by the foregoing view of the evidence.

"As the extending of the outer planks beyond the edge of the small jog in the beams was not necessarily apparent to a laborer who went on the platform in the performance of his work, there was no error in submitting the question of contributory negligence to the jury. And as there was no evidence that plaintiff had notice or knowledge of the defect the risk was not assumed.

"It is further contended under the same assignment that the alleged negligence was not that of defendant, but of fellow servants of plaintiff. If the building of stagings and scaffolds is not within the duty of a servant who may have to use them in doing his work, and if he has no hand in erecting them, he is not a party to the negligence of those servants to whom the master assigns the duty of providing such appliances, and he may recover from the master: but if it is the duty of a body of servants to construct a staging as an incident of the work upon which they are employed in common, the master performs his full duty by providing suitable and sufficient materials and men, and he can not be held by one of the body for the negligence of any of the others. *Phoenix Bridge Co.* v. *Castleberry,* 131 Fed., 175, 65 C. C. A., 481; *National Refining Co.* v. *Willis* (C. C. A.) 143 Fed., 107 There was evidence that the staging or platform in question was built by a scaffold gang under, and according to the direction of a scaffold foreman, who hired men for that purpose; that this foreman was also the foreman of the common laborers of whom plaintiff was one; and that he 'took any of the laborers who happened to be around to build the scaffolds.' But plaintiff did not take any part in building this platform, nor was it shown that he had ever performed or been called on to perform such work. Indeed, he testified that he did not know that his foreman was also the fore-

man of the scaffold gang. From this evidence it might be inferred that scaffold building was a separate branch of work, not within the scope of plaintiff's employment. And conceding that a contrary inference might also be drawn, the question was one for the jury."

The language of the court also includes in the rule machinery and appliances that become unsafe during the progress of the work but from causes other than changes in the character of the place or machinery necessarily wrought by the progress of the work.

Furthermore, the application of this rule to the facts of the case at bar draws from it a corollary that is not supported by other authority and which seems to us to be absolutely untenable. That corollary may be thus stated:

If the progress of the work which the servants are to do necessarily changes their place of work from a safe point or location to another point or location that is rendered unsafe by the failure of the master to provide proper appliances to be used by other employes in a different department of the master's work, or by the master's failure to provide a system of signals or warnings of danger, the master is not liable for the injury of one of such servants occasioned by such failure or provision.

The reason given by the Court of Appeals to support this corollary is, that when the derrick was installed and put in operation on top of the building for the use of the concrete men, defendant owed no duty to its employes in other departments to make the operation of the derrick safe by supplying the usual appliances and providing signals because, since there was, at that time, no occasion for any one but the concrete men to go upon the top of the building there was no one upon whom the danger could be effective. The progress of the work

led plaintiff to the top of the north wall and the court argued that since the master is not liable for dangers created by the progress of the work, he is, therefore, not liable for the injury occasioned by the known original danger because plaintiff was led into that danger by the progress of the work.

In applying the rule in regard to dangers created by the progress of the work to the facts here the Court of Appeals has deduced a corollary from the true rule which is a departure from the established law of master and servant of widespread importance. The rule thus established is manifestly unsound. When this derrick was installed on the roof of the building and was operated without a lever and without double ropes and without signals and without any provisions for warning or protecting those who might come within the path of the bucket it became dangerous from the very beginning to any one who might be employed along the north edge of the building. The fact that there was no one along the top of the north edge of the building at that time upon whom the danger could then operate does not affect the safety of the appliances. As we have observed, it was intended at the time of the installation of the derrick that it should remain there until the work was finished. The master knew at that time that while the derrick was there the progress of the brick work must take its servants engaged in the separate department of brick work to the top of the north wall of the building. It seems to us that the rule is stretched beyond all reasonable limits when the master is relieved from all consequences of a known continuing original danger because the progress of the work leads a servant who has no knowledge of the danger into the path of it.

This statement and application of this rule by the Court of Appeals is in such direct and irreconcilable

conflict with the law established by repeated decisions in other jurisdictions that the affirmance of this doctrine would work a startling change in the law of master and servant of the most far reaching importance. We therefore ask the indulgence of the court in an examination of some of the best considered cases on this subject.

This question has been very thorougly considered by the Circuit Court of Appeals for the second circuit in two cases. In the case of *Grace Hyde Co.* v. *Kennedy*, 99 Fed., 679, 40 C. C. A., 69, that court says:

"The defendant insists that the rule of law which directs the master to provide his servant 'with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged.' (*Railroad Co.* v. *Peterson*, 162 U. S., 346, 353; 16 Sup. Ct., 843; 40 L. Ed., 944), is inapplicable, because the street was a safe place, and the rule as to safe places does not apply when the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done. The argument rests upon the incorrect assumption that the place originally furnished was safe. The place was an avenue extensively used for travel, in which a substantial shed was to be erected at night by the use of derricks secured by ropes stretching somewhere in the avenue. It was eminently unsafe unless protected either by danger signals or watchmen. It is said, however, that when the workmen began work sufficient appliances in the way of lamps were furnished, and that it became unsafe by the way in which the work was done. This subject was considered by the court in *Baird* v. *Reilly*, 35 C. C. A., 78, 92 Fed., 884, in which, after saying that an employer cannot escape responsibility for injuries to an employe by alleged failure to make the working place reasonably safe by proof that he had furnished a competent foreman with necessary appliances and needful instructions, the court said:

'When, however, it appears that the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at

the particular time of the accident by causes that could not have been anticipated, by exigencies, created in carrying on the details of the work, or by the neglect of a fellow servant, a different rule is applicable.'

"The facts of the case do not bring it within the exceptions. The place could not be reasonably safe when the workmen began their night's work unless an adequate system was adopted for their protection against dangers which were easily to be anticipated; neither did danger spring out of sudden exigencies, or sudden neglect or mistake of a foreman or workman. The negligence, if it existed, arose from the insufficiency of the means for the protection of the workmen which were originally adopted. *Mather* v. *Rillston,* 156 U. S., 391, 15 Sup. Ct., 464, 39 L. Ed., 464.

"The defendant's assignments of error seek to introduce into the case the doctrine of non-liability for an injury caused by a co-servant, and it is urged that the danger was created by the workmen themselves; for it did not appear that there was a necessity for tying the guy lines on the other side of the street, and that occasion for warning or signals arose only in consequence of the act of the men in thus extending the ropes The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servant to do the things which will obviously prevent the known original danger. *Howard* v. *Railway Co.* (C. C.) 26 Fed., 837; *Railroad Co.* v. *Peterson, supra.* In regard to the fact of the insufficiency of the means of protection, competent testimony was introduced to show that the usual practice with respect to guarding obstructions at night in the street where men are at work is to place the red lamps upon the obstructions, or to employ a watchman for the purpose of warning against the danger. *Baird* v. *Reilly, supra.* The defendant had provided four red lanterns. Two of these had been broken the night before the accident, and the other two were on that night placed one upon each end of the beam on the street which has just been

spoken of, but there were none upon the guys of the injured derrick. There was also testimony upon the part of the plaintiff that no person had been specially designated as a watchman to give warning to drivers of vehicles, and upon the part of the defendant that the foreman and another person attended to this service in addition to their other duties. The conflict of evidence on the subject was sufficient to compel the submission of the question to the jury.

"The subject which is contained in the defendant's assignment of error that the plaintiff assumed the risk of his position and of the conditions as they existed was fully considered in *Railway Co.* v. *Archibald,* 170 U. S. 665, 18 Sup. Ct., 777, 42 L. Ed., 1188, and it is sufficient to say that the plaintiff did not assume the risk of the employer's neglect to furnish a reasonably safe system of protection against the danger from injury by passing vehicles, and that there is no adequate evidence that he continued to remain at work with the knowledge of the insufficiency of the protection which was actually furnished. The judgment is affirmed with costs." *Grace Hyde Co.* v. *Kennedy,* 40 C. C. A., 69).

And the same court in *Western Electric Co.* v. *Hanselman,* 136 Fed., 564, 69 C. C. A. Rep., 346, said:

"But independently of these considerations, the case presented is one where a servant is directed to work in a place safe in itself, but where by reason of other and independent work pertaining to the business of a common master, the servant is exposed to perils arising from the doing of such distinct and independent work. The authorities are irreconcilably in conflict as to the liability of an employer when by his direction or by an arrangement between employes engaged in a common employment, one of the employes undertakes to warn another of the perils arising in the course of said employment, due to the performance of the common work. In the case at bar, however, the facts call for the application either of the well-settled rule that a master is liable when he either fails to provide for giving warning of

danger or intrusts the duty of giving such a warning to an employe so engrossed with other duties that he could not properly and efficiently give the necessary warning, or of the other equally well-settled rule, established by repeated decisions in other jurisdictions and in this circuit, that when the perils to be apprehended arise either from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the particular servant is engaged, the master is bound to employ the necessary means to give timely warning of such danger, and that he cannot delegate his duty to any other person, so as to relieve him from liability for the negligent failure to give such warning."

Western Electric Co. v. *Hanselman,* 136 Fed., 566, 69, C. C. A. Rep., 346.

And in the Hanselmann case the court further quotes with approval the following from *Grace Hyde Co.* v. *Kennedy, supra*:

"The court below distinguished between the cases where the progress of the work itself affected the question of safety or caused the peril, and those where the accident occurred by reason of a failure to give warning of a danger with which the work in which plaintiff was engaged had nothing to do. This court in reviewing the decision below affirmed the distinction."

A very clear statement of the law is also found in *Felice* v. *New York Central and H. R. Railroad Company,* 14 New York Appellate Division, 345, in which the court says:

"The relations between a master and servant and the duty which the master owes to his servant, under the circumstances in which this man was engaged, are not at all in dispute. It is the duty of the master to use reasonable care to provide for the servant, so far as the work at which he is engaged will permit, a reasonably safe and proper place in which to do his work, and to that end, if the place may become dangerous by reason

of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them, or to guard himself against them. (*Pantzar* v. *The Tilly Foster Iron Min. Co.*, 99 N. Y. 368; *McGovern* v. *Central Vermont R. R.*, 123 Id., 280). Just how that duty should be performed in any given case cannot be determined as a matter of law. It may be that, under certain circumstances, the work is such and so done as to require the master to make rules for the conduct of the employes, so that they may be protected from the dangers which approach them. (*Eastwood* v. *Retsof Mfg. Co.*, 86 Hun., 91). It may be that some other means may properly be employed to give the warning he is entitled to; but whatever means are employed, it is the duty of the master to employ them, and that duty cannot be delegated to any other person; but in whatever way it may be exercised it remains the duty of the master, and the person appointed to perform it is the *alter ego* of the master, for whose negligence the master is liable. (*Bushby* v. *N. Y. L. E. & W. R. Co.*, 107 N. Y., 374; *Pantzar* v. *Tilly Foster Iron Mining Co., supra*). As to the performance of that kind of duty, the person intrusted with it, if anybody is so intrusted, is not a co-servant of another employe, but he is, for that purpose, the master, and his act and his neglect is the act and neglect of the master himself.

"The jury cannot say what means of warning should be adopted. The question for them is simply whether the means which were adopted to give warning in the particular case were sufficient for the purpose for which they were intended. (*Dyer* v. *Erie Ry. Co.*, 71 N. Y. 228). In this case the evidence shows that it was not the duty of any one man of those in the tunnel to look out for the safety of the rest. Each man was required to look out for himself. That being so, it was clearly the duty of the defendant to give such warning of the approach of trains as would permit each man, looking out for himself, to become aware of their approach in time to avoid them."

In the case of *Lang* v. *Terry*, 163 Mass., 138, plaintiff recovered for an injury caused by the negligence of defendant in operating a derrick withut a guide rope attached to the load. The court said:

"At the time of the accident the plaintiff was engaged in the performance of his duty, putting some boards over an iron casting on the deck, near the bow of the boat in accordance with the direction of the captain. He was struck by a swinging spile, which was hoisted by a derrick and steam hoisting engine for the purpose of being transferred from a steam barge to the barge on which he was working. The spile was hoisted and swung around without the use of a guide rope. It appears that he could have seen the spile before it struck him if he had been looking for it, and he testified that he knew they were going to lift the timber when they got ready and everybody was out of the way; but he did not suppose they were ready to start when they did. There was evidence that a warning was given him to look out just as he was struck, but not in time to enable him to avoid the swinging timber.

"We are of the opinion that it was a question of fact for the jury on the evidence, whether the plaintiff had such reason to expect the hoisting of the spile without warning, and the swinging of the spile in a dangerous way, as to require him in the exercise of ordinary care to watch the operation of the hoisting engine and look out for himself. They might think that he had reason to expect that the spile would not be hoisted while he was at work over the grating without first giving him warning, or that it would not swing in such a way as to strike him."

Another case in point is *McCauley* v. *Norcross et al.*, 30 Northeastern, 464. In that case the Supreme Court of Massachusetts said:

"If the beams were so left that one of them would be liable as a natural consequence from said intervening cause or agency to be so moved that it might fall through the floor, the fact that an intervening act or agency oc-

curred which directly produced the injurious result would not necessarily exonerate the defendant from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen, and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were left negligently near the hole in the floor where they were likely or liable to be toppled over, so that one of them might fall through the hole, and thus injure some one below, and that this was the proximate cause of plaintiff's injury, although some careless person came along and toppled them over."

We also call the attention of the court to *Grand Trunk Railway* v. *Tennant,* 66 Fed., 922; 14 C. C. A., 190, decided by the Circuit Court of Appeals for the first circuit; *Alaska Treadwell Gold Mining Co.* v. *Whelan,* 64 Fed., 462, decided by the Circuit Court of Appeals for the ninth circuit and The Pioneer, 78 Fed., 600. We consider it unnecessary to cite additional cases as we think it is apparent that this new doctrine announced by the Circuit Court of Appeals for the eighth circuit is contrary to all established precedents.

The next point made by the Court of Appeals in support of its decision is thus stated by the court:

"The plaintiff and the roofers were fellow servants engaged in the common undertaking of constructing the building for a common master."

We again call the attention of the court to the fact that this action is not based upon the negligence of the roofers but is based upon the failure of the defendant to provide the usual appliances with which the derrick could have been operated with safety and to provide a system of signals. As was said by the United States Circuit Court of Appeals for the second Circuit:

"The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger." (*Grace Hyde Co.* v. *Kennedy,* 99 Fed. 1. c. 682; 40 C. C. A., 69.)

The next point made by the Court of Appeals in support of its decision is:

"The place where the building was constructed, the materials and the machinery were free from any defects which contributed to this injury."

Just what is meant by the learned Court of Appeals by this statement is perhaps not easy to determine. The place where the building was constructed, we may suppose was like all other places where such buildings are constructed. It is not claimed that there were any defects in the materials which were used in the construction of the building. It is not claimed that there were any defects in the machinery, if by defects is meant that either the wood or iron work in the machinery was defective in any way. What is claimed in this case is that the derrick as a machine was not properly constructed—not that the material in the derrick was defective in any wise. The claim is that the derrick as a whole was insufficiently constructed because: First: No lever was placed on the mast by which the derrick and the boom and bucket could have been revolved and controlled. Second: That there should have been guy ropes on the two opposite sides of the boom so that one rope could have been used to pull around the boom and bucket and the other to control and restrain its movements. The third claim is that the boom as put up was defective because no system by way of warning or code of signals was provided by the defendant as master, to give signals

or warnings of the movements of the derrick and bucket. The latter was a want of provision and not a want of construction. The court in this case says that the duty of construction and provision is that of the master. It was just as much the duty of the master in this case to provide a system of signals and warnings, by whistles or otherwise, as it was to properly construct the derrick itself for use.

The next point made by the Court of Appeals in support of its decision is that even if defendant had performed its duty in supplying the derrick with the usual appliances for safety and had provided a system of signals, yet the roofers employed by it were such a negligent lot that if plaintiff had not urged them to be careful they would have knocked him off the building anyway. The Court said:

"In other words, if plaintiff himself and his fellow-servants had pursued the same course with the lever and the guy rope as they pursued without them, the same result would inevitably have followed."

The only construction to be given these words is that since the servants would not have used the appliances if they had been furnished and would not have used the system of signals if they had been provided and established there was no obligation upon the master to do a useless thing and make these provisions. The learned judge must surely have made this statement in a moment of inadvertence. If such were the fact the master would have had such knowledge of the negligent character of his servants that he would have been liable for retaining in his employ servants known to be unusually negligent. But there is no evidence that these concrete men exercised less care than could reasonably have been expected of them under the circumstances. They were put to work with their derrick equipped in such a manner that it was

necessary in its operation to send this bucket flying across the top of the building forty feet from the ground at a rapid rate of speed and with sufficient momentum to carry it across the building. They were not provided with a system of signals. No one was especially charged with the duty of operating the derrick. No one was stationed there to look out for the safety of other employes and to give them warning if they should be in danger. The operation of the derrick was left to any of the concrete laborers who should be near it when it was to be moved. They were so engrossed with the performance of their other duties that they could not look after the safety of other employes.

The Court of Appeals thus states its final conclusion upon the facts of this case:

"The truth is that if there was any negligence in this case, it was the negligence of the operation of a reasonably safe machine in a reasonably safe place. It was the negligence of the fellow-servants of the plaintiff or the plaintiff himself and the defendant was free from any act or omission from which the accident could have reasonably been anticipated or from which it would have resulted had it not been for the subsequent interposition of other human agencies."

This statement taken alone and considered apart from the facts of the case and the other declarations in the opinion would seem to finally dispose of this case. It is made to appear that the case involves only the determination of justice between these two litigants under well settled principles of law. But the truth is that in holding as a matter of law that upon the uncontroverted facts of this case plaintiff is not entitled to recover the Court of Appeals for the eighth circuit establishes a rule of law which, if affirmed by this court, will determine the result of every action brought in a Federal Court by an employe injured upon a structure in process of erection.

Let us see what is the true effect of this decision. If this court should affirm it as a precedent which shall control the Federal courts of this country in applying the law of master and servant, the cases cited in the brief will be necessarily overruled; this court will recede from the position taken by it in *B. & O. R. R. Co.* v. *Baugh*, 149 U. S., 368, and will extend the exception to the rule announced in *Armour* v. *Hahn*, 111 U. S., 313, so that the ancient rule of master and servant can no longer apply to construction work. The affirmance of this case would establish the following startling propositions as law.

(1). A servant who is directed to do work that will necessarily take him, in the course of that work, to a particular place can not be held to have been directed to go to that place and, consequently, the master owes him no duty to provide for his safety at that place.

(2). If the work which a servant is directed to do requires his presence at some point within certain limits of space, which point he is free to select, and he selects a point attended by a danger created by the negligence of the master, which is unknown to him and of which he has no occasion to know, the master is not liable for his injury occasioned thereby.

(3). Where servants are engaged in building a wall from the ground to the top of a structure the master can not reasonably anticipate that the servants thus engaged will be drawn to the top of that structure by their work.

(4). When a servant is drawn by the performance of his duty into the peril arising from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the particular servant is engaged, it is the duty of that servant to notify those engaged in the independent department of work of his presence even though he is ignorant of the danger.

(5). If the progress of the work which the servants are to do necessarily changes their place of work from a safe point or location to another point or location that is rendered unsafe by the failure of the master to provide proper appliances to be used by other employes in a different department of the master's work, or by the master's failure to provide a system of signals or warnings of danger, the master is not liable for the injury of one of such servants occasioned by such failure or provision.

(6). Where servants engaged in one department of work create a danger by using an improperly equipped appliance in the manner the master intended it should be used, the master is not liable for the injury of a servant in a different department of work who is led by his work in the path of that danger, because the servants who used the improper appliance are fellow-servants of the servant injured.

The decision of the Circuit Court of Appeals in this case leaves as the only possible ground of liability of the master to the servant, in respect of a safe place any defects in the materials used in construction. But as the master cannot be made liable to the servant upon the ground of defects in the materials used in construction, where the master used ordinary care in the purchase of the materials, it follows that the opinion of the learned Circuit Court of Appeals in this case, if carried out to its logical result, would eventually leave the master without any liability to furnish a safe place to his servants in any case that could be supposed or conjectured. In short, the effect of the opinion of the learned Circuit Court of Appeals in this case abolishes, as it seem to us, the rule of the liability of the master to furnish his servants a safe place in any possible or supposable case that might arise in the erection of a building five, ten, fifteen or twenty stories high.

The question thus involved is one of great importance to both the employers and the employees of America. The number of both classes runs up into the millions. This question is not only important when considered in relation to our industrial life, and those immediately engaged therein, but is important when considered as affecting the social life of the American people and our advancing civilization as a nation. We have been acting for some time, both on the part of the people and of the courts, state and federal, upon the theory that the master employer owes certain duties to the servant employe, and upon the theory that the progress, safety and well being of the whole people depend upon the proper recognition of the rights and duties of both classes. All this is, however, swept away if the decision in this case of the learned Circuit Court of Appeals is carried out and is given full force and effect. The question involved therefore, is one of great public importance.

We submit in conclusion that the judgments of both the Circuit Court of Appeals and the Circuit Court should be reversed and that the case should be remanded to the Circuit Court for a new trial.

REES TURPIN AND
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Attorneys for Petitioner.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1908.

EUGENE C. KREIGH, *Petitioner,*

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, *Respondent.*

No. 188.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Reply Brief of Petitioner.

REES TURPIN AND
JAMES S. BOTSFORD,
Attorneys for Petitioner.

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REPLY BRIEF OF PETITIONER.

I.

The first five pages of respondent's brief and argument contain and are devoted to the presentation of a motion by respondent to dismiss the writ of certiorari herein. It seems to be assumed by respondent in this motion that the granting of the writ of certiorari herein was because of the decision of this court in the case of Wisner, 203 U. S., 449, and that since the effect of the decision of this court in the case of Moore, 209 U. S., 490, is to hold that the petitioner in this case waived his objection to the removal, there is nothing left

for decision by this court on this writ of certiorari. This assumption, however, is based upon one or more errors on the part of counsel.

It will appear from pages one and two of the petition for a writ of certiorari herein that the petition is based upon two grounds of equal public importance. The jurisdiction of the United States Circuit Court for the District of Kansas is challenged for the reasons set out in the Wisner case. This being a jurisdictional question is properly discussed first in the petition for the writ. It is next shown by the petition for the writ that the decision of the United States Circuit Court of Appeals in this case is in direct and irreconcilable conflict with the decisions on the same points by the United States Circuit Courts of Appeals in the other circuits. This being a question upon the merits is properly discussed in the petition as the second ground upon which that petition is based. About nine pages of the petition are devoted to the first ground and about thirty-six pages are devoted to the second ground, so that it is apparent that counsel did not attach secondary importance to the ground for the petition stated second in order, and it is equally apparent that the second ground was fully and amply presented for the consideration of this court.

When this court grants a writ of certiorari, as in this case, the ground is not stated in the order granting the writ and it cannot be assumed or known what reason influenced this court or the justices thereof in granting the writ. There is nothing to indicate that this court granted the petition for the first reason urged in its support by counsel. As shown by the petition itself and the main brief of petitioner filed in this case, the second reason urged for the granting of the writ involved a question of great and far reaching public importance and should in itself, and apart from the other question, have moved this court to grant the writ. It may be that

if this petition had been based upon the first ground alone this court would have granted the writ; it is equally probable that the writ would have been granted on the second ground alone. One set of reasons may influence a portion of the Justices in this court in granting the writ and another set of reasons may influence the other Justices, or all of the Justices may be influenced by all of the reasons and grounds set forth in the petition for the certiorari. We cannot know what was in the minds of the Justices of this court in the granting of the writ.

The elimination of one of the reasons urged in support of the petition does not affect the status of the case in this court. Certain it is that the writ of certiorari in this cause issued conformably to law and brought the case before this court for hearing on the record the same as if it had been brought by a writ of error in cases where writs of error instead of writs of certiorari are authorized by law (*Hubbard* v. *Tod*, 171 U. S., 474, l. c., 494). And as the writ of certiorari herein was issued conformably to law and brought the whole case here, we submit that the motion to dismiss the writ of certiorari should be overruled and that this court should proceed to review the contradictory opinions and decisions of the Circuit Courts of Appeal on the questions involved in this record and that this court should proceed to decide which decision is the correct one and which enunciate the correct rule. It is the settled rule of this court that the writ of certiorari should issue where there are contradictory holdings by the different Circuit Courts of Appeal (*Hammond* v. *Forsythe*, 166 U. S., 506, and *Fields* v. *U. S.*, 205 U. S., 292). In this connection we also desire to call attention to the opinion of this court delivered February 1, 1909, in the case of *Standard Oil Company, Petitioner* v. *Anderson*, which was a case before this court on writ of certiorari to the United States Circuit Court of Ap-

peals for the second circuit. In the opinion in that case this court said: "This case is here by certiorari from the Circuit Court of Appeals which affirmed the judgment of the Circuit Court because of supposed conflict of decisions in the lower Federal courts. Upon a state of facts much resembling each other it was held by the Circuit Court of Appeals for the second circuit, in *The Slingsby,* 120 Fed. Rep., 748, that the winchman was a servant of him who furnished the winch and power, and in *The Elton,* 142 Fed. Rep., 367, the contrary conclusion was reached by the Circuit Court of Appeals for the third circuit. In the latter case, it is true, the judgment was rested upon a question of pleading and the observations of the court upon this subject were unnecessary to the decision. It is by no means certain that both cases do not differ materially from the case at bar as we view it, and we do not deem it necessary to question the conclusions reached in them." We think there is a much greater necessity for a review by this court on this writ of certiorari in the case at bar based upon the ground of opposing decisions of the Circuit Courts of Appeals than there was in the Standard Oil case above referred to from which the above citation is taken. In respondent's motion to dismiss the writ of certiorari, on page five of counsel's brief, it is suggested "that no conflict of opinion could exist upon the judgment of the Circuit Court or the United States Circuit Court of Appeals and other Federal Courts as to the question whether under the evidence in any given case the cause should have been submitted to the jury." If we understand this language of counsel, it seems to be their contention that in acting upon a demurrer to the evidence the trial court is simply engaged in the decision of a question of fact peculiar to the given case and that there is no question of law involved in such a decision. We

have always understood the rule to be otherwise, that a decision of a demurrer to the evidence or the giving of an instruction for a directed verdict to a jury involves in each case questions of law pure and simple. If the Circuit Court of Appeals' opinion in this case is consulted it will be seen that nothing but questions of law were considered or decided by that tribunal and what we contend for in this case is that the principles and rules of law enunciated by the Circuit Court of Appeals opinion in this case are not only erroneous, but the fact of their error is emphasized by the consideration that that opinion stands opposed, not only to opinions of other Circuit Courts of Appeals in like cases, but also to the opinions of the highest courts in some of the states. If that portion of our principal brief and argument commencing at page thirty-seven and extending to the conclusion thereof is consulted, we think that this court will be satisfied that the Circuit Court of Appeals' opinion in this case in deciding the law of this case did so in opposition to the opinions of other Circuit Courts of Appeal which we cited in that brief.

II.

It seems to us that respondent's counsel have fallen into several errors in their learned brief. At page six, in giving what is called by them the statement of the case, counsel, in speaking of the petitioner, used the following language: "He was foreman of the brick laying crew on the job in question. It was after consultation with him that the particular derrick was rigged upon the roof of this structure. It was designed not only to hoist the concrete material for the roofing gang, but afterward to hoist the brick for Mr. Kreigh's own men." Counsel do not point out the page of the record where the

evidence is contained that supports this statement in their brief, although in other portions of their statement and brief pages of the record are sometimes referred to. We think careful consideration of the evidence will show that counsel is in error in the above statement. The only evidence in the case which could possibly be cited on the above point in the statement of counsel is contained at page thirty-one of the record in the testimony of petitioner Kreigh as follows:

"Q. You had consulted with Mr. Clemm, the general superintendent there, about the advisibility of putting a derrick on top of the roof, before it was actually placed there, hadn't you? A. I wouldn't call it a consultation. He came to me before I was put off the first time—probably the second week I had went to work. He says, 'Kreigh, how are you going to get this stuff up? It's up to you.' I says, 'I expect to hod it up.' He says. 'No, we will have to rig up some way to get it up. I want to get up a lot of concrete, and we may as well hoist your brick stuff, but I thought I would ask you about it, what you thought about it.' I suggested to him that we either put in an elevator or a derrick, and I believe that was about the extent of our conversation along the line.'"

The statement of counsel justifies and indeeds calls for the inference that the petitioner was consulted as respects this particular derrick in its errection and that therefore he in a way was responsible for that derrick in the mode and manner of its erection. We submit that the above testimony cited does not support the statement of counsel and that there is no evidence in the record which can be cited to show that Kreigh had anything whatever to do with the erection of this derrick.

Again it is stated by counsel at the middle of said page six of their brief as follows: "The only man, so far as the record discloses, working upon the top of the

building at all were the roofing crew." The meaning of this statement is that there was no danger to anybody else from the insufficient manner in which this derrick was constructed and intended to be used. The point, that prior to Kreigh's coming on top of the roof the brick layers and hod carriers had not on that day been engaged on top of the roof, is without force when it is considered that the brick layers and hod carriers in the carrying out of their part of the work had reached the top of the building and that thereupon it would be necessary for them in greater or lesser numbers to go on and about the top of the roof. Again at the bottom of page six and top of page seven of counsel's brief, the following language is used: "obviously this tub, as it came up over the wall and along the roof to the point where the material was deposited, and as it again returned to be reloaded, had a fixed course of travel." We think that counsel is again in error in this statement. There is nothing in the record which does or could show that the tub had a fixed course of travel. Such a fixed course would be contrary to all experience in the use of derricks. The flexibility of derricks is such that material in the way of stone, concrete, or other heavy substances, may be brought from the ground at any point on the sides or front of the building where the derrick is engaged, up to the top of the building and placed at the point on the top where the particular material is designed to be used. The material in this case was concrete and the entire roof was being constructed of concrete, which was brought up and placed by the derrick at such point on the roof as called for the use of the particular concrete unloaded from the tub. The boom which brought up the tub has a circular movement around the pivot of the mast and may also be moved up and down. This is

common experience and common knowledge regarding the movement of derricks. Heavy material, consisting of stone carved for particular places in the construction of a building, may be and is carried up by means of derricks from different portions of the ground on front or sides of the building and placed at the point and place in the structure where the particular stone or material is designed to be used. The most cursory observation of a derrick shows the error of counsel in assuming that this particular tub or bucket which knocked the petitioner off of the building "had a fixed course of travel." This assumption of counsel constitutes the basis of a considerable part of counsel's argument and is the erroneous basis of much that is said by counsel in their learned brief. For example, in speaking of petitioner in the middle of page seven of counsel's brief, they say, "He stood looking north and directly in the path of the tub." As we have seen the tub had no path. The roof of a large building, large both in width and length, was being constructed of the concrete which this tub, by means of the derrick, was carrying up to the top of the building and the concrete from the tub was presumably emptied at that part of the roof where that particular concrete was needed. Again at the bottom of page ten, in speaking of the tub, counsel say, "Swung from the derrick out toward the wall in its usual course," and thus running through the entire brief of counsel we find the erroneous assumption that this tub had a fixed course. As we have seen, the derrick is very flexible in taking up material from any part of the ground below in front or on the sides of the building and placing that material in any place in the walls or on any place on the roof.

III.

Commencing at page nineteen of their brief, counsel make an argument in support of a contention that the charge of negligence contained in paragraphs (a), (b) and (c) of the first specification of negligence contained in plaintiff's petition are unsustained by the proof. The other specifications of negligence appear upon page eight of our principal brief.

The first contention of defendant's counsel in this respect is that the proof failed to show that the use of either a lever or two ropes on this derrick was necessary to propel it and control it. The expert evidence in this case is all one way in support of the proposition that two ropes working as counter forces to one another at the end of the boom are an absolute necessity in the operation of a boom and derrick and it seems to us that the proposition is so obvious as to be manifest without the necessity for expert evidence. Here is a derrick and a boom. The boom is habitually moving horizontally receiving heavy material below at different points in front and on the sides of the building and carrying that material up to different points on top of the building. It would seem as if the most cursory consideration of the subject would suggest the necessity of a rope at each side of the boom to move it in each direction horizontally over and about the sides of the building. Respecting the use of a lever on the mast of the derrick we think the testimony of the witnesses give ample support to the proposition that the lever should have been used on the mast of this derrick. The testimony of the following witnesses in the case amply proves, as it seems to us, the necessity for a lever on the mast: James Cuthbert (Record, p. 56), W. N. Gedney (Record, p. 76), S. J. Hayde (Record, p. 83).

However, counsel seem to be driven at last to the position that a lever on the mast could not be used in this case because there was no floor between the derrick and the north wall. Thus, at the bottom of page twenty-six of counsel's brief they say "it is curiously to be noted in this connection that counsel overlook two physicial facts growing out of the situation on the roof which would have precluded the employment of a lever. The first is that the space between the derrick and the wall was open and the second is that to have been of any use the lever would necessarily have to be from twelve to fifteen feet long, depending upon the distance between the end of the boom and the mast." Counsel here contend that a lever, although proper in ordinary cases, could not have been used here because there was no floor on the top of the roof where the derrick was situated between the derrick and the north wall over which the derrick was bringing the tub and returning it to be refilled. This seems to us a strange suggestion. The building which was being erected was under the entire control of the defendant. If an appliance in connection with the use of the derrick, such as a lever in its mast, was reasonably necessary to safely propel and use the derrick, and if the defendant was using that derrick and was in charge of the whole building as building contractor thereof, as is admitted, and if the use of a lever in the mast depended upon having a floor on the top of the building then certainly it was defendant's duty to lay that floor and it does not seem to be either reasonable or logical that defendant's counsel should attempt to excuse the want of a lever because of the failure of defendant to have a floor on top of the building between the derrick and the north wall. Indeed, the observation of counsel on this branch of the case seems to be a confession without an

avoidance. Moreover, the lever could have been attached to the mast at right angles to the boom and the derrick could have thus been operated from the platform then in existence. The error of counsel in regard to the necessity for a lever and for two ropes instead of one leads us to make a more elaborate explanation of this point so that the court may clearly understand it. Any plan of construction of a derrick which rendered it necessary to send a large heavy tub flying uncontrolled at a rapid rate of speed across the top of a tall building where men were expected and required to work was negligence in itself since a practicable way of avoiding it was in common use. But it is contended by counsel that since the tub was being propelled in a northerly direction when it struck the petitioner and there was a rope attached to the southerly side of the boom and extending back to the platform where the concrete was deposited, that the absence of a rope on the northerly side of the boom did not cause the injury. The absence of a rope on the northerly side and the absence of a lever on the mast were the very things that rendered the quick and violent shove necessary. If this derrick had been provided with two ropes one would have invariably been used to pull the boom in the direction in which it was desired to go and the other to steady and control its movement as it was being so pulled. At the bottom of page nineteen and at the top of page twenty of their brief, counsel say, "of course, by means of the rope it was within their ability, had they chosen so to do, to steady and control the progress of the empty bucket on its return to the ground, but it appears from the proof that they were not in the habit of doing this, but swung the bucket over the roof without holding on to the line at all." This sentence reveals the misconception counsel have of the purposes served by each of the double ropes. Of

course, these men were in the habit of swinging the bucket over the roof without holding on to the line at all. Swinging the bucket over the roof by the impetus of a shove was the only means by which this derrick could be operated in the absence of double ropes and a lever. One rope on the derrick was wholly insufficient, as shown by the evidence in the trial court, as a means of controlling the movements of the boom and indeed this is a matter of common knowledge. Since no rope was provided for pulling the bucket out over the wall after it had been unloaded, it was necessary to send it out by a quick shove. When thus propelled its movement could not be regulated or controlled by the one rope because to hold that rope and with it restrain the movement of the bucket on its outward course would overcome and nullify the propelling force. One might as well attempt to throw a stone and control it while in flight by means of a string tied to it. It is apparent that the stone could not be sent forward horizontally and be held to a slow, even and controlled flight by means of holding the string. Anyone crossing the course of the flying stone would be struck before the stone could be stopped. The absence of a proper propelling force in a northerly direction rendered the one rope on the southerly side wholly useless as a means of controlling the movement of the derrick in a northerly direction. The roofers used the only propelling force provided for them by the master.

IV.

Defendant seeks to avoid responsibility for this injury upon the theory that it was caused by the negligence of fellow servants. It contends that its other servants, the roofers, were negligent in sending this tub flying uncontrolled across the top of this building where

men in other departments were expected and required to work. Without a provision for some propelling force other than a shove its flight must have been rapid and its movement could not have been controlled with the single rope while the tub was on its outward swing. As we have seen, in operating the derrick they pursued the method intended by the master and rendered necessary by the lack of proper appliances. We repeat here what we have said so often in our principal brief, that there is nothing in this case to show that the fellow servants of the plaintiff, or the roofers as they were called, who used the derrick, used it in any other way or manner than was contemplated by the defendant. There is nothing in the case to show that the roofers did not do their best with the very insufficient and defective appliances furnished by the defendant.

Defendant's counsel seek to further support their contention that plaintiff's injury was due to the negligence of his fellow servants by two questions and answers which were propounded in the trial court by the Presiding Judge and which are repeated at the top of page seventeen of counsel's brief, as follows:

"Q. As a matter of fact, if those men who were pushing that bucket had notified you, standing where you were, that they were swinging that bucket out there, you could have gotten out of the way and not been hurt? That is true, is it not? A. Certainly.

Q. They didn't do that, and that is the way you come to get hurt? A. Yes, sir."

Those two questions are framed so as to call for a conclusion and it does not really seem necessary that they should have been asked. While they did not bring out any new facts, but only emphasized the lack of any provision whatever for warning, these questions and answers establish the second and third specifications of

negligence in plaintiff's petition which are set out upon page eight of our principal brief. The plaintiff states that he could have gotten out of the way if he had been warned of his danger, and for this failure to give warning defendant is liable, but that in no way negatives or excludes liability for its negligence in failing to properly equip the derrick in other respects. If the derrick had been properly equipped the tub would not have been sent flying uncontrolled across the building at a dangerous rate of speed and plaintiff might have gotten out of the way of it even though he had not been warned, and, although the derrick was operated in this extremely dangerous manner, if he had been warned he might have avoided the consequence of defendant's other act of negligence. The several charges of negligence are in no way inconsistent and establishing one certainly does not deny the others. Whether the injury was caused by a concurrence of all of the acts of negligence charged, or by one of them alone, the defendant is liable. It is evidently the purpose of defendant's counsel to create the impression that the injury was caused solely by the failure of these roofers to give warning to the plaintiff and that such failure was the negligence of fellow servants for which the defendant would not be liable, but as was said in *Grace Hyde Co.* v. *Kennedy*, 99 Fed., l. c., 682, 40 C. C. A., 69, "The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes and that the absolute duty of the master to provide a safe place is not avoided by the negligence of a representative or servants to do the things which will obviously prevent the known original danger," and in *B. & O. R. R.* v. *Brown*, 146 Fed., 24, cited by defendant's counsel on page fourteen of their brief, the court said: "Did the negligence in question pertain to an absolute or personal duty imposed

by law upon the master? If it did, no delegation of that duty to another, in any grade of his service, can relieve the master's liability for non-performance of the duty." This well established principle of law is recognized not only in those cases but in many others cited in our principal brief.

It seems to be the contention of counsel that although defendant wholly failed to make any provision for signals or warnings of danger, it was absolved from all liability for the lack of warning because the roofers also failed to warn plaintiff of his danger. This duty to give warning was the defendant's own personal non-delegable duty. Why should the defendant be relieved from the performance of its own duty by the failure of these common laborers, engrossed in their own work, to devise, institute and follow a system of signals or warnings of danger to those engaged in another department of work, of their own motion and without direction of the defendant? The fact remains that the master's absolute duty was not performed. This injury was not caused by any failure of these roofers in their duties in laying the roof, but by the failure of the defendant in its duty in constructing the whole building. Do counsel contend that the master is liable only when he attempts to perform his duty and does not properly perform it and is not liable when he makes no effort to perform it at all? To leave common laborers engrossed in their own work to devise on their own motion a scheme or code of signals to warn those engaged in a different department of work without any direction on the part of the master who erected the derrick is in itself very gross neglect on the part of the master. Do counsel contend that failing to instruct and direct them to give warning was a delegation of this duty to them? It was the duty of the master to provide a safe place for the

plaintiff in the performance of his duty and it could not delegate to the laborers who operated the derrick the performance of its personal duty to provide a code of signals warning the plaintiff and others of the dangers from this derrick. Even if it had attempted to delegate to the laborers employed in using the derrick its personal duty which it owed of properly erecting the derrick and providing for proper appliances in its use and providing a code of signals such attempt would be no answer to the charge of neglect if the servants in point of fact failed to discharge the duty thus delegated to them.

Even, however, if the roofers were shown to have been guilty of negligence in some manner or degree, still as the negligence of the defendant in its failure to provide the lever, two ropes for the boom and a code of signals constituted the main cause of plaintiff's injury. defendant is liable although the negligence of defendant's fellow servants may have contributed with the negligence of defendant. However, there is no proof of negligence of the fellow servants.

V.

Since the preparation of our principal brief in this case the Supreme Court of Kansas has delivered an important opinion in a somewhat analagous case. We refer to *Brice-Nash* v. *Barton Salt Company*, 98 Pacific Reporter, page 768. The opinion was handed down December 12, 1908. The plaintiff in that suit sued for damages on account of an injury received while in defendant's employ. The demurrer to the evidence was sustained by the trial court, but that was reversed by the Supreme Court. It was the duty of plaintiff, as defendant's employee, to go at times into the packing room

of defendant which was partly filled with salt, which rose nearly perpendicularly to the height of about twelve feet. The practice was for the workmen from time to time to pick the face of the salt with long bars until it caved off in quantities suitable for packing into sacks and barrels. When they were looking for a fall while the plaintiff was present, they would tell him to look out—to keep away. On the day of the accident plaintiff came into the packing room to inquire about a shipment. While thus in the room, without any warning to him, there was a fall of a large portion of the salt and plaintiff was seriously injured. There were in the room at the time two other employees of defendant, Swofford and White, whose duty it was to give warning to others of the approaching fall of the salt so as to avoid danger. The contention in the case was that plaintiff's injury was due to the neglect of those two men as fellow servants and that therefore the master was not liable. The syllabus indicates that the Supreme Court made full answer to this contention as follows:

"Where the method adopted by a salt company for carrying on its business involves the occasional dislodging of masses of salt, thereby covering the floor of a room with fragments moving with such force as to expose to danger employes who are there in the discharge of their duties, and the only adequate way to protect them from such danger is to warn them just before such dislodgement, the giving of such warning is a non-delegable duty of the employer, and its omission imposes a liability for any consequent injury to an employe, regardless of any question of co-service."

In the opinion in that case the Kansas Supreme Court uses the following language:

"The principal contention of the defendant is that Swofford and White, whose failure to give warning of the resumption of work and the consequent caving off of

the salt is the negligence complained of, were fellow servants of the plaintiff, and that his recovery was properly denied on that account. Whether the relation each bore to their common employer was such as to bring them within the scope of the rule invoked need not be determined, for we hold that the evidence would have justified a finding that the defendant owed a positive and non-delegable duty to the plaintiff under the circumstances stated to give him warning that an immediate fall of the salt was to be expected.

"A situation involving a somewhat similar question was presented in *Belleville Stone Co.* v. *Mooney*, 60 N. J. Law, 323, 38 Atl., 835; the decision of the Supreme Court being indicated by the seventh paragraph of the syllabus, reading as follows: 'Where the system of the working of a stone quarry was one whereby no protection was afforded to the workmen engaged in another portion of the quarry apart from the blasting from injury from flying stones, caused by the explosions of the blasts in the rock, except the warning word 'Fire' given at the time the fuse was communicated to the explosives of the blast, and one of the rules of the master was that no employe should leave his work to seek safety from the dangers of the blast until the warning 'Fire' was given by the foreman, whose duty it was to light the fuse, it became and was the duty of the master in the exercise of reasonable care to have such warning announced suffiicently long enough before the explosion for such workmen or employes, in the exercise of ordinary care, to reach a place of safety; and this duty being delegated to such boss or foreman does not relieve the master from the liability to answer for the neglect of the boss or foreman to perform that duty. This neglect is not an incidental act of the co-service.' The case was taken to the Court of Appeals and Errors, and there affirmed; the grounds of the decision being thus stated (61 N. J. Law, 253, 39 Atl., 764, 39 L. R. A., 834: 'Two views are suggested—one, on behalf of the plaintiff, that the giving of proper warning was an essential part of the duty owed by the employer to the

workman of taking reasonable care that the place where the workmen were engaged should be kept safe, and therefore if, through negligence, the proper warning was not given, the employer's duty was not performed; the other, on behalf of the defendant, that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, in which work the foreman was clearly a fellow servant of the plaintiff, engaged in a common employment, and therefore his negligence in that incidental service was not chargeable upon the common master. On reflection, it will be perceived that the giving of warning bore no direct relation to the foreman's work in preparing and firing the blast. The object of that work was the removal of rock, and such object would be attained as well without the warning as with it, if we leave out of consideration the safety of the workmen. Quite different are the conditions where a person using a tool or machine is obliged to see that the implement remains fit for use. In such case the duty to examine is auxiliary and incidental to the duty to use; and, when a servant owes the latter duty to his master, he owes the former also. A failure to perform carefully this incidental duty of examination may result in damage to a fellow servant, but the common master is not responsible for such damage, because the duty neglected was not one owed by him outside of that duty. .There may have been a similar duty of inspection owed by the master to his servants, but the duties themselves are distinguishable from each other. In the present case, however, as already pointed out, the duty to give warning was not in any such sense subservient to the blasting of rock. On the other hand, when we consider the general duty owed by an employer to his employes to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh* v. *Thornton*, 58 N. J. Law, 160, 33 Atl., 380), the propriety of including therein the duty of giving warning, in such circumstances as those now before us becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workman scattered about the quarry,

but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but, as the defendant's responsibility extended beyond the selection of an agent and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent.' We regard this reasoning as sound in itself, and as consistent with the rules on the subject which have gained general recognition by the courts."

It seems to us that the decision of the Supreme Court of Kansas in the above case and the point expressed by the court in its syllabus, as well as the foregoing citation from the opinion, are strikingly applicable to the case at bar.

Some of the remarks of this court in the case of *The Standard Oil Company* v. *Anderson,* decided by this court February 1, 1909, seem to us also to be applicable to this case. In that case this court in its opinion used the following language:

"It will aid somewhat in the ascertainment of the true test for determining this question to consider the reason and extent of the rule of a master's responsibility. The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather re-statements than explanations of the rule. The accepted reason for it is that given by Chief Justice Shaw in the case of *Farwell* v. *Boston* &

Worcester Railroad Corporation, 4 Metcalf, 49. In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a 'great principle of social duty,' adopted 'from general consideration of policy and security.' "

There is another remark of the opinion of this court in that case which seems to us to be applicable to all constructions and erections of large buildings in our large cities. We refer to the following language of the opinion of this court in that case:

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos."

More appropriate language could not be used as applicable to the large number of different groups of workmen engaged in the various callings requisite for the erection of large buildings.

Upon the point in this case sometimes hinted at, that the plaintiff was injured as a result of his own neglect, the opinion delivered by the Circuit Court of Appeals in the case of *United States Smelting Co.* v. *Parry,* 166 Fed. Rep., p. 407, is applicable. This opinion was delivered January 6, 1909, by Circuit Judge Van Devanter for the court. We quote the following language from the opinion of the court in that case:

"It is the duty of a master to exercise reasonable care to provide a reasonably safe working place for his servant, and the latter is entitled to act upon the as-

sumption that that duty has been performed, unless the contrary be known to him, or be so patent as to be readily observed by him. He is not required to make an investigation or inspection to ascertain whether or not that duty has been performed, but only to have due regard for what he actually knows and for what is so patent as to be readily observed by him, by the reasonable use of his senses, having in view his age, intelligence, and experience. *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade,* 191 U. S., 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *Holloway,* 191 U. S., 334, 337, 24 Sup. Ct. 102, 48 L. Ed. 207; *Texas & Pacific Ry. Co.* v. *Swearingen,* 196 U. S., 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382; *Butler Frazee,* 211 U. S., —, 29 Sup. Ct., 136, 53 L. Ed., —; *Burke* v. *Union Coal & Coke Co.,* 84 C. C. A. 626, 157 Fed. 178; *Missouri, K. & T. Ry. Co.* v. *Wilhoit,* 87 C. C. A. 401, 160 Fed. 440; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Donovan,* 87 C. C. A. 600, 160 Fed. 826; *Chicago Great Western Ry. Co.* v. *McDonough* (C. C. A.) 161 Fed. 657, 661; *Kirkpatrick* v. *St. Louis & S. F. R. Co.,* 87 C. C. A. 35, 159 Fed. 855; *Western Investment Co.* v. *McFarland* (C. C. A.) 166 Fed., 76. The evidence before recited made it at least permissible for the jury to find that the insecure condition of the scaffold, although discoverable by an investigation or inspection, was not known to the plaintiff, and was not so patent as to be readily observed by him, without more than a reasonable use of his senses. True, when he was sitting upon the end of the scaffold, he could have leaned over sufficiently to have looked thereunder, and, had he done so, could have seen that no foot lock was there; but he was not required to make even that effort at investigation or inspection, if, as was positively stated by him, nothing occurred to indicate that any of the planks was insecure. And, had he seen that no foot lock was there, he still would have been entitled, in the absence of any indication to the contrary, to assume that the planks had been made secure by nailing at the other end."

VI.

As a finality and as something which counsel evidently regard as conclusive of the whole case, counsel at page thirty-five of their brief suggest that the plaintiff was guilty of contributory negligence because he did not, while immersed in the discharge of his important duties, continually stand and look and listen as if he were crossing a railroad track, and authorities as to the well known duty of pedestrians in crossing a railroad track are cited by the learned counsel in their able and ingenious contentions. It would seem very extraordinary if it were held that the duty of these brick layers, hod carriers and their foreman, in the discharge of their duties in erecting a building, were the same as pedestrians crossing a railroad track. If such were the rule the owners of buildings would have serious grounds for complaint of the delays in erecting a building. Here is a derrick on top of a building used in roofing the building. At the same time a large number of brick layers, hod carriers and others, are engaged in erecting a brick wall along sixty feet and as a part of the work in that erection a scaffold is being built near the top of the building. The derrick is engaged all along the building. It has, as we have seen, no fixed path. It is not like a railroad in that respect—the derrick carrying up and lowering the bucket all along the sixty feet where the brick layers are engaged. It may go down ten feet from the northeast corner in one case, twenty feet in the next case, thirty feet in the next, forty feet in the next, and so on. In short, the bucket may descend, as a result of the manipulation of the derrick, at any point along the entire building where the brick layers are engaged in erecting the wall. To require those brick layers to be constantly watching for the coming and

going of that bucket would so disable them in the performance of their work that they could only perform a very small part of their usual and ordinary work. Again, if the position of this derrick and the use that is made of it are to be likened to a railroad train, then confessedly it should have been provided with not only a whistle but also with a bell, neither of which was done in this case. It seems to us that this last final conclusion of counsel constitutes its own refutation and that further remarks on this branch of the case are unnecessary.

Respectfully submitted,

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Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED.
MAR 16 1909
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

NUMBER 188.

EUGENE C. KREIGH, PETITIONER,

VS.

WESTINGHOUSE, CHURCH, KERR & COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S MOTION TO DISMISS THE WRIT, AND BRIEF AND ARGUMENT ON THE MERITS.

JAMES H. HARKLESS, and
CLIFFORD HISTED,
Attorneys for Respondent.

In the Supreme Court of the United States.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION TO DISMISS THE WRIT OF CERTIORARI.

Comes now the respondent and moves this Honorable Court to dismiss the writ of *certiorari* issued in this cause for the reason that it appears from the record that this is a simple common law action instituted by the plaintiff to recover damages for personal injuries alleged to have been received by the petitioner while in the employ

of the defendant Company, and no constitutional question, or question involving the construction of any statute of Congress or other Federal question of any kind or character was or is involved in the case, and no conflict of decisions upon the merits of the cause are or can be involved in the decision of the question of fact presented in the record.

The case was instituted in the State District Court of Wyandotte County, State of Kansas. On the application of the respondent the cause was removed to the United States Circuit Court for the appropriate Federal District in the State of Kansas. Neither the petitioner nor the respondent at the time of such removal was a resident or citizen of the Federal District to which the case was removed, and neither one resident or citizen of the State of Kansas. Hence, it is conceded that under the decision in the case of *ex parte Wisner*, 203 U. S., 449, the Federal Court would have remanded the case for want of jurisdiction if the same had been requested by the petitioner, plaintiff in that case. But no motion was made to remand the cause for want of jurisdiction in the Federal Court, but both parties appeared and the case went to trial in that court without objection, resulting in a judgment against the plaintiff, petitioner.

Thereafter the plaintiff, petitioner, prosecuted his writ of error in said cause to the United States Circuit Court of Appeals for the Eighth Circuit and the cause was briefed, argued and submitted to that court without any question of jurisdiction being raised. That court affirmed the judgment of the Circuit Court. Thereafter the

petitioner applied to this Honorable Court for a writ of *certiorari* basing his petition, as appears from the record in this case, upon the ground that neither the United States Circuit Court before which said cause was tried nor the United States Circuit Court of Appeals had jurisdiction in the premises, for the reason that at the commencement of the suit neither the plaintiff petitioner nor the respondent was a resident or citizen of the State of Kansas, and averring in the petition for a writ of *certiorari* that this Honorable Court in *ex parte Wisner,* above cited, had in effect held that said courts were without jurisdiction and this notwithstanding the parties had appeared and gone to trial in both courts without raising the jurisdictional question. In that state of the record this Honorable Court issued the writ of *certiorari* obviously for the reason that the decision of this court in *ex parte Wisner* had by some expressions therein given some color for the contention that the plaintiff, under such circumstances could not waive the objection to the jurisdiction by going to trial upon the merits. This Honorable Court doubtless issued the writ of *certiorari* here so that a further definite expression of opinion upon that subject might be promulgated by this court, and any questions concerning the jurisdiction in such cases could be settled. But since this writ of *certiorari* was issued, to-wit, on April 20, 1908, this Honorable Court in case *in re Moore,* 209 U. S., 490, and again in 210 U. S., 368, *Western Loan* v. *Butte Mining Co.,* has decided the very question which this writ of *certiorari* seeks to bring up for correction and decision, holding therein that the plain-

tiff by appearing and going to trial in the Federal Court waived any right to afterwards contend that the court did not have jurisdiction, and in effect holding that any language in *ex parte Wisner* to the contrary was not in harmony with the decisions of this Honorable Court theretofore rendered. So that these cases finally settle adversely to petitioner here the only question which was or could have been the reason for issuing the writ of *certiorari*. The respondent submits, therefore, that the writ of *certiorari*, being purely a discretionary writ and employed only at the instance of the court to settle apparent or claimed apparent conflict in decisions, and that question having long since been finally determined by this court, and the petitioner having no inherent right to the writ of *certiorari*, and there being no longer any doubt upon the question upon which this writ of *certiorari* was obviously predicated, the same should now be dismissed. This court in the Barrington case, 205 U. S., 483, enunciated the principle we invoke here when it was said:

"But if these questions are wholly without merit, *or are not longer open by reason of our previous decisions, it has long been settled that the writ of error should be dismissed.*"

Such being the rule as to writs of error, regarded as writs of right, for stronger reason should it be the rule as to writs of *certiorari*, which are discretionary only and to which the litigant has no inherent claim.

The respondent in this cause further suggests that while it is true that the petitioner in his application for

the writ of *certiorari* also predicated his right upon a second ground that the judgment of the Circuit Court for the United States for the Eighth Circuit was contrary to the general course of decisions on the point involved on the merits of the case, yet the record shows that the controversy presents simply a case of common law negligence. We furthermore submit that no conflict of opinion *could* exist upon the judgment of the Circuit Court or the United States Circuit Court of Appeals, and other Federal Courts, as to the question whether under the evidence in any given case the cause should have been submitted to the jury, and that such second claim of the petitioner in his application for a writ of *certiorari* presents no state of facts showing any existing conflict upon legal questions of any kind or character, such as this Honorable Court would or will under the practice with reference to writs of *certiorari* assume to determine.

The premises being considered the respondent therefore respectfully prays that inasmuch as no purpose is now to be subserved and the impelling cause for the issuing of the writ no longer existing, and the question which suggested its issue having already been finally determined *in re Moore* and in *Western Loan* v. *Butte*, above cited, the writ should be now dismissed, and respondent so prays.

Respectfully submitted,

JAMES H. HARKLESS and
CLIFFORD HISTED,
Attorneys for Respondent.

STATEMENT OF THE CASE.

Eugene C. Kreigh, the plaintiff, was a man of large experience in the work at which he was engaged at the time of his injury. He is a bricklayer by trade, and from the time he learned his trade in 1887, he followed the occupation, gradually progressing, until he was made a foreman in charge of brick work. He was foreman of the bricklaying crew on the job in question. It was after consultation with him that the particular derrick was rigged upon the roof of this structure. It was designed not only to hoist the concrete material for the roofing gang, but afterwards to hoist the brick for Mr. Kreigh's own men. At the time of the injury, however, the brick work had not been carried up to a height requiring the use of the derrick. The only men, so far as the record discloses, working upon the top of the building at all, were the roofing crew. Of course, the entire structure was in an incomplete condition; the upper portions of the structure consisted of nothing but the skeleton steel work, and the roof was being covered with concrete. The derrick was a small affair, setting some twelve feet back from the north wall. A long rope was attached to the boom, by which the men working on the roof would pull the load over to them and the tub when released of its load would be pushed back over the wall and descend to the ground on the north side of the building. Obviously, this tub as it came up over the wall and along the roof to the point where the material was deposited, and as it

again returned to be re-loaded, had a fixed course of travel. It was a part of the work of the concrete gang to pull the load over and dump it on the roof, and to send the empty tub back. As they would return the bucket they would cry out some warning, as for example, "take it away," "take it off," or "all right," or "look out below."

Mr. Kreigh had never been upon the roof except on two occasions before he was injured. This was some time during three or four days prior, and on these two occasions the derrick was not in use, the concrete men working on a roof on a lower building. On the day of his injury Mr. Kreigh, according to his own testimony, went again upon the top of the building for the purpose of directing his bricklaying gang in the building of some scaffolding below. He moved along the wall from various points and finally took a position standing on a board that was laying right over the north wall. He stood looking north, and directly in the path of the tub. He had been there but a few seconds when he was struck by the tub as it was pushed by the men on the roof, and was knocked off to the ground below. He says in his testimony that while he knew the derrick was in position and knew that the concrete men were on the roof he did not know how they were using the tub, and particularly, did not know how they were getting it off the roof to the ground. He also says that he did not hear any signal or warning of any kind given by the concrete men before he received the blow. The following significant testimony was brought out by the questions of the trial court (p. 38):

"Q. As a matter of fact, if those men who were pushing that bucket there had notified you, standing where you were, that they were swinging that bucket out there, you could have gotten out of the way and not been hurt? That is true, is it not? A. Certainly.

Q. Did they not do that, and that is the way you came to get hurt? A. Yes, sir."

The brief of the plaintiff in error is confined to the proposition that the evidence introduced made a case for the jury and that it was error for the court to sustain a demurrer.

In support of his contention the plaintiff in error advances three points:

(1) That the defendant supplied an improperly constructed and equipped derrick;

(2) That no system of signals or warning was provided by the master to be used by the employes who were on the building (by which we presume is meant the roof), before the bucket was started, and

(3) That no warning was given to the plaintiff at the time he was hurt—which is a dependent proposition to the second.

We will discuss these contentions, premising our argument with the suggestion of the familiar rule many times announced by this court that:

"There is always a preliminary question for the judge at the close of the evidence in every trial to a jury, and that is, not whether or not there is any evidence, but whether or not there is any substantial evidence, upon which a jury can properly render a verdict for the party who relies upon it."

Cole v. *German Savings & Loan Soc.*, 124 Fed., 114.

BRIEF AND ARGUMENT UPON THE MERITS ON BEHALF OF RESPONDENT.

In the event that the motion of the respondent to dismiss the writ of *certiorari* above requested shall not be granted, and this Honorable Court shall enter upon the decision of the cause upon its merits, the respondent submits the following:

I.

INSOFAR AS IT IS CLAIMED THAT THE INJURY TO THE PLAINTIFF PETITIONER WAS BROUGHT ABOUT BY THE OTHER WORKMEN UPON THE BUILDING THE DOCTRINE OF FELLOW SERVANT EXEMPTS DEFENDANT FROM LIABILITY.

In support of this proposition we invite a brief consideration of the facts and the application of familiar principles declared by this court. The uncontradicted facts appearing from the record, briefly stated, as the same pertains to this proposition are:

That the defendant (and hereafter for convenience we shall use the term plaintiff for the petitioner and defendant for the respondent) was engaged as general contractors for the Proctor & Gamble Company in the construction of a building at Kansas City, Kansas, in the year 1904. The plaintiff, an experienced foreman, was in the employ of the defendant engaged in the prosecution of the general work, to-wit, the construction and completion of the building, having in charge the super-

intendence of the work known as the brick construction, and of the bricklayers engaged in the construction of that portion of the building. At the same time there was another portion of the work of the same building being prosecuted by other workmen also engaged for the defendant in the laying and constructing of the concrete roof on top of the building, which roof extended to the wall upon which the brick work was going on. The parties engaged in the concrete work on the roof also had a foreman and this foreman of the concrete work and the plaintiff foreman of the bricklaying work, each employed by the defendant, were in turn under one general superintendent, to-wit, one Mr. Clem, both foremen and the parties under them engaged in one common undertaking and common purpose, to-wit, the construction of the building.

The plaintiff's case, among other grounds (which we shall hereafter discuss) is predicated upon the allegation and claim that while he was on the top of the building in the discharge of his duty looking after the construction of the wall and the work of the bricklayers under him, that the other workmen engaged in the concrete roof work near by him, each of them being on top of the building, by their acts caused the bucket which was carrying the cement from the ground to the roof, and suspended on a derrick on top of the building, to be swung from the derrick out toward the wall in its usual course, and knocked the plaintiff from the building on to the ground, and injured him. That they failed to warn him and ought to have observed his presence and negli-

gently shoved the bucket against him. So far as this allegation of negligence is concerned we submit and urge that it presents no cause of action against the defendant for the reason that the plaintiff, foreman of the bricklayers, was a fellow servant with the parties engaged in the concrete work, operating the bucket which it is claimed they negligently pushed against him, and upon this proposition of law we invite the consideration of the following cases:

194 U. S., 338, *Northern Pacific* v. *Dixon;*
162 U. S., 346, *Northern Pacific* v. *Peterson;*
146 Fed., 24, *B. & O. R. R.* v. *Brown.*

In 194 U. S., above cited, this court had occasion to thoroughly discuss the proposition submitted here in which this court, quoting from a previous decision, enunciates this complete and rounded rule decisive of this case as follows:

"We have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

Tested by this rule it would seem that further discussion of the proposition we contend for might be unnecessary, but to apply it to the particular situation dis-

played by the facts in this case, we find that the plaintiff and foreman in charge of the bricklayers, and cement workers on the same building, and on top of the same roof with the foreman, were all jointly engaged in the same general undertaking and purpose. They were alike, and equal, joint servants, and fellow workers, in accomplishing and bringing about one general purpose. The construction of the building necessarily consisted of the brick work and the concrete work, one incomplete without the other. The construction of both necessary to reach the common desired purpose. They were both engaged for the same master, and the plaintiff and the other co-workers whose acts he complains of, were under one general superintendent. The service of each and every one was directed to the accomplishment of the same general end.

In the Dixon case referred to this court had occasion to consider the question as to whether the local train dispatcher of a railroad was a fellow servant with the fireman. In that case the local operator had charge of the despatches, having for its purpose the communication of directions as to the management of the train, the fireman having charge of the engine which moved the train, their separate efforts resulting in a desired joint result, and this court applied the doctrine above stated to that situation, holding that they were fellow servans.

However, it may be here suggested that the case in hand is even not so far removed from claimed difficulty in the application of the rule as the one in the Dixon case. In that case there might have been some room for con-

tending at least, as was done in the dissenting opinion, that the parties were so disconnected as the rule ought not to apply, but in the case at hand no such difficulty arises because they were all at work on top of the same building, necessarily working in connection and with reference to, the convenience and necessary position of each other in the performance of the same task at the same place. No contention could be reasonably made as to the facts in this case that there was any existence of so-called separate "department" service or separate "branch service."

The case in 162 U. S., 346, above cited, is likewise an enunciation of the same clear distinction and recognition of the doctrine we are contending for. In this last cited case the act complained of by the plaintiff was the negligence of a boss or foreman over men engaged under him, in doing a claimed negligent act which resulted in the injury to the workman under him, and this court held, and properly held, that the foreman became a fellow servant with the workman under the familiar rule heretofore quoted. If it be true that the master cannot be required to respond for the act of the foreman over the parties engaged under him for his claimed negligence toward such workman, *afortioria* may it be said that the foreman in this case occupies no stronger position for claim upon the master when he himself is injured by the acts of other servants engaged in the same enterprise.

In the 146 Fed., 24, above cited, Judge Gray, in disposing of the controversy in that cause, very aptly and concisely stated a cardinal principle deduced from the

decisions of the Supreme Court of the United States when he said:

"It is the character of the duty, rather than the grade of the servant or employe whose negligence causes the injury, that must determine the liability of the master. Did the negligence in question pertain to an absolute or personal duty imposed by law upon the master? If it did, no delegation of that duty to another, in any grade of his service, can relieve the master's liability for nonperformance of that duty. There is sometimes difficulty in ascertaining whether the negligence does or not pertain to such absolute duty of the master. We think, however, there is no such difficulty in this case. The undisputed evidence shows no want of ordinary care in the selection and employment of Mulch (the foreman) or in making the barge platform and pier reasonably safe places on which to work, and the provision of the plates to bridge the space between the platform and the cars, satisfy any reasonable demands upon the defendant for safe appliances in connection with the work to be done. Under these circumstances, as we have said, the negligence of the foreman (Mulch) in not replacing the plate after the car was moved, was the negligence of a fellow servant, the risk of which was of course assumed by the plaintiff, when he entered into the employment of the defendant. Where tools or appliances that are to be used only as occasion requires, are furnished by the master, their negligent use by one servant resulting in injury to another servant, cannot be imputed to the master."

Applying this principle, the solution of the question of the fellow servant doctrine in the case at bar is fraught with no difficulty. The duty that the defendant in this case owed to the foreman who brings this action was an absolute duty as distinguished from a delegated duty, so far as it pertained to furnishing reasonably competent servants and such usual appliances as the prosecution of

the business prudently conducted demands. This duty is an absolute one as distinguished from a delegated duty. Such acts as the servant may perform under the direction of the foreman, or superintendent, as the case may be, falls within that class of duties or obligations known as delegated duties, and the act of any of the parties engaged in the common enterprise which may result in injury to another fall within that line known as delegated duty. In other words, the master must necessarily delegate to those under its employ the implied privilege of performing and doing their work so far as their personal movements are concerned, to the servants themselves, including of course the plaintiff foreman and those working with him. The master cannot be present to immediately superintend the action of the servants in the particular or given case, or have control of what they may or may not do in comporting themselves in the conduct of the business or their acts with reference to each other. This is a duty that must necessarily be delegated to the respective servants themselves. The liability, or non-liability to injury resulting from the acts of coworkers engaged in a common undertaking, working together upon the construction of a building, is one of the things that all the servants, without regard to rank, must necessarily assume when they enter into the common employment, and such assumption for convenience of application is commonly known as the fellow servant doctrine. Therefore, applying this plain and elementary principle to the case at bar we reach the inevitable conclusion that in so far as any claimed negligence in this case is attri-

butable to the co-workers upon the building the master cannot be held to respond.

It is to be here noted that the specific charge of negligence in the petition with reference to the alleged defects in the derrick are as follows:

(a) Said derrick was so constructed and operated that there were no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employes of the defendant violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building, and also move with it said arm.

(b) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

(c) The ropes and pulleys on said derrick were defective, insecure and improperly arranged and used.

Now, if we concede for the purposes of the argument that these charges of negligence against the defendant were sustained by the proof (which we shall hereafter discuss) it would not avail the plaintiff here, because of the intervention of the sole, efficient cause, to-wit, the acts of the fellow servants. And this was evidently the view of the trial court upon the question, as evidenced by the fact that on the trial of the cause as appears from the record, the court put to the plaintiff the following questions, to which the following answers were made (p. 38):

"Q. As a matter of fact if those men who were pushing that bucket had notified you, standing where you were, that they were swinging that bucket out there, you could have gotten out of the way and not been hurt? That is true, is it not? A. Certainly.

Q. They didn't do that, and that is the way you come to get hurt? A. Yes, sir."

So we insist that if we are correct in the contention that the direct cause of the plaintiff's injury was the act of his fellow servants, then it becomes wholly unnecessary to consider the other allegations of negligence in the petition because of the fact that the act of the fellow servants was the proximate and efficient cause of the accident.

This is not a case of concurrent negligence of a master with that of employes and does not fall within any of the authorities which are cited in the brief of counsel for the plaintiff in error. How could a defect in the derrick such as that contended by the plaintiff, even if true, be said to have been a concurrent cause of this injury? Is it possible by the widest stretch of imagination that the contractor could have foreseen, or reasonably anticipated as the probable consequence of the failure to provide a lever to the mast of the derrick, the peculiar and extraordinary chain of circumstances which transpired and resulted in the injury of Mr. Kreigh? To seriously contend that he could, is to set at defiance all reason and human experience, and is to subject the master to a rule of liability and a measure of obligation that at least up to this time has never been asserted by any court. If Westinghouse, Church, Kerr and Company can be held in damages here by reason of this injury to Mr. Kreigh

the ordinary and familiar rule of fellow servants will have to be abrogated.

In the case of *Cole* v. *German Savings and Loan Soc.*, 124 Fed., 113, this court announced the rule which it seems to us completely fits this case and effectually disposes of the contention of the plaintiff in error. We quote:

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause of the injury.

"It is no defense to an action for damages for an injury of which the act or omission of the defendant was the proximate cause that the negligent or wrongful act of another concurred with the recklessness of the defendant to produce the untoward result.

"But the concurring negligence of another cannot transform the remote into the proximate cause of an injury, or create or increase the liability of the defendant. It cannot make an injury which was not the natural and probable result of the negligent acts or omissions of the defendant their natural and probable consequence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury, and no one is liable for an injury unless it was the natural and probable result of his act."

But, laying aside the question of fellow servant heretofore discussed, how stands the case upon the question of negligence? This we will now proceed to discuss.

II.

THE CHARGE OF A DEFECTIVE AND FAULTY CONSTRUCTION OF THE DERRICK UNSUSTAINED BY THE PROOF.

The particular specifications of his complaint with reference to the derrick made by the plaintiff in his amended petition are sub-divided as follows:

"(a) Said derrick was so constructed and operated that there were no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employes of the defendant violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building, and also move with it said arm.

(b) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

(c) The ropes and pulleys on said derrick were defective, insecure and improperly arranged and used."

When the proof is analyzed it will be seen that the complaint narrows down to the single assertion that a lever should have been rigged to the mast so that the boom could be moved by means of a lever. It appears in evidence that in place of a lever a rope was attached to the boom by which the load was pulled over the roof to the point where it was desired to deposit the material and the tub was then pushed back over the roof to the ground below by the concrete men. Of course, by means of the rope it was within their ability, had they chosen so to do, to steady and control the progress of the empty

bucket on its return to the ground, but it appears from the proof that they were not in the habit of doing this, but swung the bucket over the roof without holding on to the line at all.

Briefly summarized the plaintiff's testimony upon this subject was as follows:

B. F. SMITH (p. 40) says: It was a stiff leg derrick. There was a floor where the derrick was and then there was a space that was not floored out at the edge, and they had to give it swing enough to throw it over that space, so it would go out over the wall. There was no arm or lever on the derrick. There was a rope attached at the end of the boom and they would push it out and pull it in with the rope.

D. A. RILEY, a bricklayer, described this derrick a little more fully at page 51: It was situated at the northeast corner of the building, probably about twelve feet south of the north wall and an equal distance west of the east wall, resting on top of the steel beams that were to form the roof of the coal bunkers. Some boards were lying on top of the steel beams, back from the wall probably twelve feet, and between those boards and the north wall was an open space (p. 52). A tag line was attached to the end of the boom and some one on the roof of the building would pull the rope. The bottom of the box was hung on hinges and fastened with a clasp and pin. They would remove the pin and the bottom would fall down and the material would drop out of the box. A man would then push on the box and give it momentum that would carry it out over the wall, and over the open

space mentioned. There was but one rope attached to the end of the boom which was used to pull the boom around on the building to pull the box in. There was no arm or lever on the mast. There was no way of controlling the boom of the derrick after it was once given a shove. It would swing on around until it stopped of its own accord outside of the wall.

On cross examination he said: This tag line was in reach of the concrete gang of men and if a man had hold of that rope he could stop the bucket.

(Page 53):

"Q. You said to Mr. Turpin that there was no way, after that boom got started that it could be stopped. A. Not when a man was pushing on the box.

Q. If the men took hold of that rope they could stop that bucket if it was going over that wall, couldn't they? A. Not in a short distance.

Q. Couldn't they stop that boom by holding on to that rope? A. Not in time to keep from knocking a man off.

Q. It is not a question of time. Couldn't they stop it? A. Yes, sir.

Q. Could they pull it back? A. Yes, sir; they could pull it back.

Q. If they put sufficient force on it, they could stop it in a very short space, could they not? A. If there was two or three men a hold of it they could.

Q. There was nothing but the empty bucket going back, was there? A. That is all.

Q. That is the only weight? A. Yes, sir."

JAMES CUTHBERT, a contractor, testified (p. 56):

"Q. For the purpose for which you heard detailed this morning, this derrick was being used, state how they are usually constructed. A. This derrick was what was

called a stiff leg derrick, I understand. They are guyed with two stiff legs on an angle of probably sixty-five, and they are generally circled at the bottom and what we call head lines, a line on each side of the boom to guide it around, and with good and sufficient blocks and tackle. It is owing to what you are going to hoist with it. If you have a heavy lift, you have to rig your derrick accordingly.

Q. How are they usually constructed for the purpose of moving the boom either in or out? A. You mean swing the boom around?

Q. Yes, sir. A. Well, it is owing to the state of the weather sometimes. When you are using a large derrick, you have to use a block and tackle, sometimes with a lever. On this building here (referring to the court house) I used a block and tackle and guyed the boom around. The usual way on a light derrick like that would be to have two guy ropes on the point of the boom, one on each side, and the duty would be of the men—one man detailed for each of them guy ropes—when you are moving that around, to hold the ropes and steady it.

Q. The purpose of the guy ropes is what? A. Steady the boom as it goes around.

Q. State whether or not either of those guy ropes are used for the purpose of swinging the bucket in and the other to swing it out? A. One to swing one way and the other way, yes."

Without encumbering the record with the cross examination of this witness (pages 58, 59 and 60) it will be observed from reading it that the only difference between his theory of the kind of derrick that should have been used and the one in question was that there should have been a line on the other side of the boom as well. He makes no requirement of a lever. The purpose of these two ropes, as he says, would be to steady the bucket by the use of the particular rope opposite to the direction

in which it was going. But in this case, inasmuch as the bucket was moving to the north, the rope which should have been used, even under Mr. Cuthbert's testimony, was a rope on the south of the boom, which was in fact provided. A guy line on the north for that particular purpose would obviously have been unavailing and is so admitted by the witness.

The testimony in the form of a deposition of Angus M. Turner, a contractor, was offered by the plaintiff and an effort made through his testimony to attack the derrick in use, but it will be observed that the court sustained objections to all of this testimony. (See pages, 66, 67, 68 and 69.) Nor is the plaintiff in error urging any complaint of error of the rulings of the court in that respect.

One question was permitted of a hypothetical character (see pages 68 and 69), which went, however, not to the method of construction, but "to the usual and ordinary method of manipulating such a derrick."

The evidence of the witness will be searched in vain for anything which supports the charge in the petition that the defendant furnished an improperly constructed derrick in the omission of a lever from the mast.

The deposition of W. N. Gedny, a contractor was also offered by the plaintiff in an effort to sustain his contention, but the court sustained practically all of the objections to that testimony. (See pages 71, 72, 73, 74, 75 and 76), and the rulings of the court emasculated the deposition of any probative force.

Such testimony as finally passed the challenge of objection is as follows (p. 76):

"Q. In your opinion, the only respect in which the derrick described by Mr. Turpin was not properly operated was that it did not have a lever on the staff or mast to control the boom? A. There was no lever and no man both. The lever would do no good without the man.

Q. If there was no lever, there would be no occasion for having a man there? A. No, sir.

Q. Then it resolves itself down, in your opinion, to a failure to have a lever on the mast to control the boom? A. Yes, sir."

Of course, this testimony utterly fails to support any charge of negligence in that it throws no light, whatever, upon the usual and ordinary practice of men engaged in that business under the circumstances disclosed by the proof, but is a mere vague assertion of opinion by this witness without any showing whether it relates to a situation like that presented to the contractor in the case at bar or not.

STEPHEN J. HAYDE, a contractor, testified (p. 79):

"Q. If what is known as a stiff leg derrick is placed at the top of a building for the purpose of raising material for work on the building, and the material is hoisted in a bucket or tub attached to a rope run through the derrick and attached to an engine which furnished the power for hoisting the bucket, and the derrick swings out over the outside of the wall of the building and is then raised by the engine, and is then swung around so that the bucket may be dumped at a convenient place on the building, what is the usual method of moving and swinging and controlling the boom of such a derrick so as to swing the boom of the derrick and the bucket in to place the material, and out to place the bucket on the outside of the wall? A. With a hand lever clamped to the mast of the boom."

On cross examination the witness testified (p. 82) that he had used derricks without a lever, but a guy rope instead, but used two lines, one on either side for the purpose of guiding the load, and that in his opinion one line would not be sufficient. On page 83 in answer to the question of the purpose of the lever he answered as follows:

"A. You would have a lever attached to the main mast, run out far enough for the power of one man to control the boom."

He also testified (page 83) that this lever would run east and west and be attached about thirty inches from the base of the mast and then when asked the question (p. 83):

"Q. Suppose he turns that boom to the north, what good does that do? A. Your line would be out here, so you could not turn it any further to the north that a man couldn't get hold of it."

On page 84 the witness testified:

"Q. The point about the lever is that by having the end attached to the mast solidly, by holding to the lever you can prevent the boom from swinging one way or the other? A. Yes, sir.

Q. *But as I understand you a rope attached to the end of the boom would serve the same purpose on the swing out, although not on the swing in?* A. *Yes, sir, if they would hold it.*"

At the outset of their argument the learned counsel for the plaintiff in error assert that there can be no question "that the defendant supplied the concrete men on this building with a derrick that was improperly constructed and equipped and that defendant did not use appliances which would make its operation safe and that

were known to builders and were in common use on buildings at that time."

It is manifest from the foregoing analysis of the proof, however, that the counsel are in error in this assertion. There is, in fact, but one witness of all those produced (Mr. Hayde) who undertakes to say that a derrick such as that employed in the case at hand should have been equipped with a lever. The last two questions and answers which we have quoted from Mr. Hayde's testimony appearing on page 84 of the record, effectually refute any claim that the absence of the lever amounted to actionable negligence against the contractor.

As said by Mr. Hayde, the purpose of the lever was to prevent the boom from swinging one way or the other and in the next answer he concedes that a rope attached to the end of the boom would answer the same purpose.

Mr. Cuthbert and Mr. Turner both show by their testimony that ropes attached to the boom are in common and accepted use in place of levers fixed to the mast.

It is therefore to be observed that the charge of defect in the derrick in this respect finds its sole support in the averment of the plaintiff's amended petition and the declaration of counsel in their brief. It is curiously to be noted in this connection that counsel overlook two physical facts growing out of the situation on the roof which would have precluded the employment of a lever. The first is that the space between the derrick and the wall was open and the second is that to have been of any use the lever would necessarily have to be from twelve to fifteen feet long, depending upon the distance between the end of the boom and the mast.

Of course, in turning the boom to the left and on to the building the lever would necessarily have to be pushed to the right, which was north. The result of the two physical facts adverted to is that it would have been necessary to push the lever to a point immediately above, if not beyond the north wall of the building which, of course, could not have been accomplished under the situation existing at the time. The rope then was obviously the only appliance which it was practicable to employ, and those experienced in the matter have admitted in their testimony that it was proper.

But, be this as it may, under no fair interpretation of these facts can the defendant contractors be said to have been negligent in supplying a rope at the end of the boom instead of a lever at the mast to do the same thing. Two witnesses seem to indicate that there should have been two ropes, one like that which was used and another on the north side of the boom running to the ground. It will be remembered, however, that the injury was incurred in swinging the tub to the north and over the wall. Of course, a rope on that side could not have been used to steady, or stop, or control the bucket in its progress, so that the absence of such a rope under no possibility cut any figure in producing the result in controversy.

We then have a simple case of a substitute of a rope for a lever. It certainly does not require the testimony of any witness to demonstrate the obvious truth that by means of the rope the bucket could have been steadied, stopped and kept completely under the control of the

concrete gang as it was being pushed over the wall, if they had but chosen to do so—and indeed the witnesses as we have seen testified to this same fact. The trouble was that the men did not make any effort to avail themselves of this means furnished by the master for regulating the speed and controlling the movement of the bucket. So far as appears by the testimony they did not even touch the rope, but gave the tub a swing and let it go flying through the air without the slightest effort of control. As was justly observed by the court below it is self-evident that they would have been equally heedless if they had been furnished a lever instead of the rope. Certainly this court cannot presume, and there is no testimony from which it can be even argued, that the men would have employed any other device to return the empty tub if a lever had been attached to the mast.

The duty of the master, as we understand it, is not always to furnish the latest or even the most approved means, appliances and tools. His duty is performed when the appliances which he does furnish are reasonably safe and calculated to perform the function for which they are designed. Neither is it the duty of the master to see, at his peril, that the appliances and means of safety furnished by him are actually used by his employees. He performs his full duty in that regard when he supplies them.

See recent decision in *American Bridge Company* v. *Seeds,* 144 Fed., 605.

It is too plain for argument that the application of these rules completely refutes any charge against the

contractor growing out of the absence of a lever to the mast.

It perhaps would not be out of place to observe here that this was an extraordinary event and one which could not in the ordinary course of business have been anticipated by the contractor. This is a circumstance to be taken into consideration in determining the nature of the equipment which it was furnishing its men with which to do this work. The pushing ot an empty tub off of a roof and down the wall was not a dangerous work and hazardous transaction, especially to people on the top and in plain sight, nor one which as ordinarily conducted could be reasonably anticipated to result in injury to anybody. It had a fixed course across the roof and down the wall. Nobody would imagine that a person would voluntarily take up a position on the skeleton steel work at the extreme edge of this wall directly in the course of the empty tub, when by the exercise of the slightest attention on his part he could not fail to observe that the tub was on the roof and was about to be sent back.

Now, when the contractor furnished these men a rope attached to the boom by which they could, if they chose, hold, stop and control a tub of comparatively light weight, at their entire pleasure, how can it be seriously argued that he was remiss in any duty which he owed to anybody. To contend under such circumstances that he was negligent would be, we submit, to hold that the master is liable from the mere circumstance that an injury has occurred.

III.

AS TO THE ALLEGED FAILURE TO FURNISH A SYSTEM OF SIGNALS.

The counsel for the plaintiff in error are not entirely lucid in their presentation of this proposition. It does appear from the extracts of the testimony which they put upon their own brief and others which we shall presently quote, that the concrete gang did signal by an outcry of some description when they were about to lower the empty tub. The plaintiff, himself, was the only other person on the building in need of any signal or warning and he had never been there before during the time the concrete men were at work on the roof.

There is no proof that the men did not cry out a warning before starting the empty tub.

B. F. SMITH testified (p. 41):

"Q. You were familiar with the way they pushed and pulled that bucket, were you not? A. Yes, sir.

Q. And it was customary to give the men a warning there, wasn't it? A. That is the way I always seen them do.

Q. They always gave a warning before that? A. They always signaled him.

Q. They gave a warning to whom—the engineer or Mr. Kreigh? Or who was it? A. Mr. Kreigh didn't have anything to do with it.

Q. Who would they give the warning to? You said you heard them give a signal. Who was it to? A. I didn't understand you. You asked me if it was customary to always give a signal?

Q. Yes, sir. A. Yes, sir; but they didn't that time. I didn't mean it was customary on that work, for they had no signal that I know of, only to just holloa. They had no whistle.

Q. You mean they had no whistle? A. They had no signal.

Q. They hallooed, didn't they? A. Of course, they had to do it some way.

Q. Then they did halloo, didn't they? A. Yes, sir.

Q. Then they gave a signal, didn't they? A. I don't call that no signal.

Q. That is a difference in your opinion. You don't call hallooing a signal? A. No, sir. Everybody was hallooing there. He didn't know who was hallooing.

Q. Who would they halloo to? A. I suppose the engineer.

Q. Who would do the hallooing? A. I don't know; any one of the men.

Q. Would halloo to the engineer? A. Yes, sir.

Q. What did they usually say? A. I don't remember; anything.

Q. 'Take it away,' or 'take it off,' or 'all right, or 'look out below?' A. Something like that.

Q. Any call indicating that they were ready to take the bucket away? A. Yes, sir.

Q. And they didn't do it this time? A. *I don't know whether they did or not.*

Q. You don't know whether they gave a warning at that time or not? A. No, sir.

Q. But prior to that, at all times, you noticed that they had a signal 'look out,' or 'get out of the way below'? A. Yes, sir. They made some kind of a noise. They had to do it.

Q. All the times before this accident that you noticed? A. Yes, sir.

Q. And you couldn't say whether they did this time or not? A. No, sir."

The foregoing is all of the testimony which was offered by the plaintiff upon the subject of a signal or code of signals or what the men did or omitted to do with reference to warning except the statement of the

plaintiff himself that he didn't hear any signal or warning before the bucket struck him (p. 26). He, however, does not undertake to say in his testimony that no signal or warning was in fact given.

We are quite at a loss to understand the logic which, based upon such testimony, can lead to any conclusion of negligence on the part of the master. The complaint made in the petition, as we have seen, was in failing to supply and use a system of signals or warnings to notify persons on the building when the tub, etc., was to be moved.

We find that the men engaged in the work, and whose duty it was to move the tub, did in fact have a system of signals or warnings indicating that they were about to move the tub. It is immaterial whether this code or system was one furnished to them by their employer or whether it was a system adopted by themselves. It certainly appears from the proof to have been an appropriate method. The calls of "look out below," "take it away," etc., are significant. We do not see how they could have been improved upon. If they were sufficient to warn people on the ground and the engineer stationed some fifty to one hundred feet away, we await with interest the suggestion of a reason why they were inadequate to warn an individual standing within twelve feet of the men crying them out.

It is further worthy of observation here that these concrete men were standing in this short distance from the plaintiff in plain view of him, and in his plain view if he had paid attention to his surroundings. He endeav-

ors in his testimony to avoid the facts, but it none the less is reasonably apparent from his evidence that he did, in fact, know that the men were at work on this roof, knew that the tub was up there, and also knew the course which it would have to take on its return to the ground below. He failed to pay any attention to his surroundings. He put himself without heed in the only place on the entire length of the roof where he might come in contact with the bucket, and then deliberately turned his back and went on about other matters without any regard to his surroundings.

Apropos of this complaint of negligence, we have seen upon analysis it is confined simply to the failure to signal and particularly to warn plaintiff. It cannot be contended that a system of warning adequate for all other purposes was not employed. If we should grant that any distinctive warning should have been given the plaintiff under the peculiar facts and circumstances of the case, it is obvious that it was merely the omission of a duty to give a particular warning at a particular time, and does not amount to a failure on the part of the master to provide and furnish a code and system of signals and warnings. This is self-evident from the fact that so far as appears from the record these concrete men were the only people working on the roof. As gathered from the testimony of the plaintiff himself, he was never upon the roof before except on two occasions, on neither of which were the concrete gang at work. We then have the case where

the only occasion on which he appeared upon the roof and upon which a warning was required was the time when he was hurt. Obviously, the master was not under any obligation to provide a complete or any code of signals and warnings for the extraordinary event developed by this proof, and the omission of the warning on the particular occasion constituted, not a breach of duty on the part of the master, but negligence on the part of the fellow servants simply.

IV.

THERE IS NO EVIDENCE THAT NO WARNING WAS GIVEN TO THE PLAINTIFF.

Petitioner fails to quote any testimony, whatever, which sustains this statement. In the immediately preceding sudivision of our argument we have set out all of the testimony bearing upon the subject, which utterly fails to support this contention of counsel. As we have already said the most that can be urged is that the defendant failed to hear any such warning, and he says that if he had been notified he could have gotten out of the way. But, as we have just urged in the preceding sub-division of our argument this all becomes immaterial when it is remembered that if there was an omission under the particular facts and circumstances to warn the plaintiff it was an omission of duty of fellow servants and not negligence of the master for which liability could attach.

V.

PLAINTIFF'S OWN NEGLIGENCE CONTRIBUTED TO HIS INJURY.

The case is a somewhat peculiar one in respect to the conduct of the plaintiff, who was an exceptionally intelligent and capable man. The derrick was in plain view of the plaintiff upon the roof and he fairly admits in his testimony that he knew that the men had rested the tub on the roof and, of course, he must have known that they would soon be sending it back. He apparently became absorbed in the particular work in which he was engaged and entirely oblivious to his surroundings. He then went along the wall to a point directly in front of the derrick and in the path that the bucket must follow, turned his back upon the men and gave his entire attention to what the people below him were doing, utterly unmindful of his own situation. Of course it goes without saying that he owed a duty to pay reasonable heed to his situation.

"A person crossing railway tracks must devote his attention to his line of travel during the time he is in the range of passing cars and cannot be contented with a last look when entering the sphere of danger and then blunder on oblivious of his surroundings, but must continue to look and listen until safely across."

Ross v. *Ry. Co.,* 113 Mo. App., 600.

This court in the case of *National Biscuit Co.* v. *Nolan,* 138 Fed., 6, held that when the plaintiff, an "intelligent, self-poised girl," heedlessly and unnecessarily placed her arm in a position of danger, she was guilty of

such contributory negligence as would bar recovery against her employer, the defendant, such contributory negligence consisting in her heedless disregard of the danger of being injured by the machinery in the place where she thrust her arm.

The case is no different than if Kreigh had thoughtlessly stepped off of the wall and sustained an injury. He was guilty of negligence for which no reasonable excuse can be advanced from the proof.

We shall not undertake to multiply authority or to further elaborate this argument. The facts are simple. They speak for themselves. It is quite true that Mr. Kreigh sustained a grievous injury. It is equally true, *first,* that The Westinghouse, Church, Kerr & Company was not at fault either in respect to the character of the derrick or in respect to any other charge of negligence made in plaintiff's amended petition, and *second,* that the cause for the plaintiff's injury, coupled with his own negligence, was the negligent and reckless conduct of his own fellow servants, which of course was among the risks assumed in his employment.

VI.

It will be noted from the brief of counsel for the petitioner in this court that they have given their attention largely to selecting from the opinion of the Circuit Court of Appeals in this case certain isolated paragraphs, and seeking to discuss the same as if they stood alone, disconnected from the balance of the text of that opinion.

We shall not undertake to discuss the matter from the standpoint they have selected for the reason that that opinion as a whole answers every argument that counsel have attempted to urge against it, and neither can it be successfully said that the paragraphs selected from the opinion discussed by the counsel in their briefs are when considered with the whole opinion, in conflict with any decisions to which they have referred, and neither is it true that any diverse opinion exists in the Circuit Courts or Circuit Court of Appeals, when measured by the facts displayed in this record. It is not so much the law of this case that can trouble the petitioner, but it is the cold, uncontradicted facts applied to generally well recognized principles that must resolve the action against him.

In conclusion, if the court shall take up the case upon its merits, we respectfully urge that the judgment of the Circuit Court of Appeals should be sustained.

Respectfully submitted,

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Kansas City, Missouri, March 4, 1909.